FILED

94 506 SEP 20 1994

OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

TERRI TILLMAN-BROWN and DONOVAN BROWN,

Petitioners,

vs.

CITY OF SACRAMENTO, DETECTIVE STANFIELD,

Respondents.

Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER H. WHELAN, INC.
LEO F. DONAHUE, ESQ.
Attorneys for Petitioners
11246 Gold Express Drive, Suite 100
Gold River, California 95670
Telephone: (916) 635-5577

144 PP

THE QUESTIONS PRESENTED FOR REVIEW

I. Can the California Supreme Court ignore this court's holding in St. Amant v. Thompson 390 US 727 (1968) cited with approval in Hebert v. Lando 441 US 153 (1979) that when a police affiant entertained serious doubts as to the truth of material facts in an search warrant affidavit he acted in reckless disregard for the truth?

II. Can good faith immunity lie when the officers who both authored the search warrant affidavit and executed the raid admitted on case examination they entertained serious undisclosed apprehensions about the key issue of which house the drugs were allegedly purchased from?

III. Can a reviewing court, in a Franks hearing (Franks v. Delaware 438 US 154 (1978) append a search warrant

affidavit with facts the affiant officer was ignorant of at the time the original affidavit was authored in order to create probably cause?

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED FOR REVIEW .	i
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
1. Factual Background	4
2. Basis For Federal Jurisdiction In The Court Of First Instance	15
REASONS FOR ISSUING A WRIT OF CERTIORARI	16
ARGUMENT	16
WHY REVIEW SHOULD BE GRANTED . . .	17
A. All Officers Admitted That They Entertained Serious Doubts Or Apprehensions As To The Truth Of The Material Allegation In The Affidavit Supporting The Search Warrant. This was Direct, Unrefuted Evidence Of Reckless Disregard For the Truth Of The Affidavit.	17

B. Good Faith Immunity Does Not Lie When The Officers Who Authored The Affidavit Admitted They Entertained Apprehensions About The Key Issue From What House The Drugs Were Allegedly Purchased. 31

C. It Was A Mistake Of Law For The Supreme Court Of The State Of California To Approve The Trial Court's Decision To Add To STANFIELD's Affidavit Facts To Support An Inadequate Affidavit That STANFIELD Was Ignorant Of At The Time Of His Affidavit. 43

CONCLUSION 52

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Franks v. Delaware
438 US 154 (1978) . . i, 16, 17, 37, 41, 44-47, 49-51

Hebert v. Lando
441 US 153 (1979) i

St. Amant v. Thompson
390 US 727 (1968) . . . . . i, 20, 23, 30

U.S. v. Davis
617 F.2d 677, 694
(D.C. Cir. 1979) 18-20

U.S. v. DeLeon
979 F.2d 761, 763-764
(9th Cir. 1992) 45, 46

U.S. v. Stanert
762 F.2d 775, 780
(9th Cir. 1985) 18

U.S. v. Williams
737 F.2d 594, 602
(7th Cir. 1984) 19-23, 25

STATE CASES

Higgason v. Superior Court
(1985) 170 Cal.App.3d 929 41

People v. Fein
(1971) 4 Cal.3d 747 41

People v. Johnson, supra., (1990) 220 Cal.App.2d 35

People v. Maestas (1988) 204 Cal.App.3d 1208, 1216 . . . . . 18, 37, 41

STATUTES

28 U.S.C. Section 1257(a) 2

Code of Civil Procedure Section 582 1

OTHER PERSUASIVE AUTHORITIES

Rules of the United States Supreme Court, Rule Number 10 2

OPINIONS BELOW

Opinion of Superior Court delivered by the Honorable Judge Backus, Superior Court of the State of California, County of Sacramento order and judgement dismissing Petitioners 42 USC 1983 cause of action against the illegal search and seizure (4th Amend., U.S. Const.); dated December 23, 1992, titled "Determination of Probable Cause."

January 12, 1993, judgment on the merits in accordance with Code of Civil Procedure Section 582.

Order and judgment of the State of California, Third District Court of Appeal order dated April 1, 1994.

The order denying the petition for rehearing in front of the State of California, Third Appellate District.

The denial of the petition for review by the Supreme Court of the State of California.

STATEMENT OF JURISDICTION

Date of the entry of judgement sought to be reviewed: June 22, 1994, denial of petition for review by the Supreme Court of the State of California from the granting of a judgement of dismissal with prejudice in the Superior Court of State of California, County of Sacramento.

This Court has jurisdiction to review the judgment in question by writ of certiorari by virtue of 28 U.S.C. Section 1257(a), and Rules of the United States Supreme Court, Rule Number 10.

STATUTES INVOLVED

U.S. Const., Amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Factual Background

Petitioners, TERRI TILLMAN-BROWN and DONOVAN BROWN, are African American citizens residing at Oak Park area of Sacramento, California, County of Sacramento were victims of a "wrong house" drug raid based upon a constitutionally invalid affidavit, warrant and search. Petitioner's home was broken into and entered by the Sacramento City Police (Police) on April 28, 1989, during a search for "crack cocaine." During this search, the police destroyed Petitioners' possessions and spilled and scattered over TERRI TILLMAN-BROWN's bed, the cremated remains of a long-time, close, personal friend that were entrusted to her.

Two or three days prior to the narcotics buy that led to the illegal intrusion into TERRI TILLMAN-BROWN's residence, the police were contacted by a confidential informant ("CI") who indicated that he had purchased drugs on numerous occasions at a residence on one of those "San" streets (the Petitioners resided at 3340 Santa Cruz Way). Late one afternoon with only an hour of work time to kill, the police decided to accomplish a "quick buy" to provide corroborating evidence for the CI's alleged statement that he purchased drugs at a residence on one of those "San" streets.

Three police Sgt. Seivertson (the supervisor), Sgt. Farnsworth (the trainee), and Detective STANFIELD were the only officers involved in the alleged "controlled buy." They met with the CI prior to the raid, searched him, and gave

him money to buy drugs. The original search warrant and affidavit recited a sterile, boilerplate affidavit that had as its factual basis only two events:

(1) Information given to the City Police Department by a confidential informant; (CI) and,

(2) The alleged "controlled buy" that took place on April 18, 1989.

Judge John Stroud, the magistrate who reviewed the affidavit, stated in his declaration he considered only the search warrant affidavit itself to make his decision that the affidavit was legally sufficient.

According to the Police Department's own policy a "controlled" buy did not take place. Furthermore upon case examination serious apprehension was admitted by all the officers who participated in the alleged "controlled" buy. They admitted

serious doubts as to the truth of material allegations contained in the underlying affidavit, i.e. which house the drugs were actually purchased from.

The officers admitted they lost sight of the CI when he was approximately one half of the way between the public street and Petitioner's house. The CITY admitted that no officers, based on their observations, knew which house the CI went up to or into on Santa Cruz Way. No officers knew whether the CI picked up something inside some house on Santa Cruz Way, and no officer observed whether the rock cocaine the CI came back with actually came out of 3340 Santa Cruz Way (the Petitioners' residence). All officers admitted apprehension about what the CI did because Seivertson lost sight of the CI and did not see him go directly to the door. When the officers returned

to the neighborhood and reacquired sight of the CI, the CI was again on a public street in his truck and not at or near the front door of the Tillman-Brown residence as claimed in the underlying affidavit. The CI, when he was first seen after the buy, was engaged in an agitated discussion with an adult black male in the CI's truck.

Seivertson never saw the CI leaving the front door or the front porch of any house on Santa Cruz Way as is implied in the original affidavit. Seivertson never saw the CI walking back through any yard. Seivertson said he never told anyone (including the affiant) that he saw the CI coming back from the Tillman-Brown front door or any front door on Santa Cruz Way. Seivertson never told anyone he saw the CI coming back from the Tillman-Brown front porch or from the front porch area of the

Tillman-Brown yard or that he saw the CI walking back through the Tillman-Brown yard or any yard. Although the officers, according to the CI, were informed that a "chip down" drug transaction involving rock cocaine occurred between the CI and an adult black male while in the CI's truck, this fact and our reference to the adult black male in the CI's vehicle was left out of the underlying affidavit. This drug transaction, known to the officers, was intentionally never disclosed to the magistrate in the original affidavit. STANFIELD (the affiant) confirmed that he also did not see the CI leaving the TILLMAN-BROWN house, porch, or yard but reacquired view of the CI only as the CI was getting into his truck on Santa Cruz Way, and, at that time, there was an adult black male

between 10 and 50 feet of the CI's vehicle.

STANFIELD denied that he knew the adult black male was in the CI's vehicle until he read the May 1, 1989, memo of Seivertson but this testimony was directly contradicted by Seivertson who said that STANFIELD told him (Seivertson) that STANFIELD told the DA about the adult black male in the CI's truck prior to the raid of April 28, 1989.

STANFIELD (the affiant), testified that he was upset, shocked, and would not have gone forward with the search warrant if he knew about the adult black male being in the CI's truck. He stated that the "control" would have been destroyed and that because, therefore, probable cause, would have been destroyed he would not have gone forward to even seek a search warrant, much less write an

affidavit. This lack of "control" was known by all the City officers involved and discussed by all officers with the CI.

Seivertson, on May 18, 1989, testified that he was apprehensive because he lost sight of the CI and did not see the CI go directly to the door of any home.

STANFIELD testified that Seivertson should have disclosed to STANFIELD (the affiant) Seivertson's apprehension resulting from the fact he only saw the CI one half way to the front porch, and that Seivertson didn't reacquire a view of the CI until the CI was at the CI's truck. STANFIELD (the affiant) testified that Seivertson's failure to disclose these apprehensions were "material" misrepresentations and that this information "should have been disclosed to him." STANFIELD also stated that if he

knew about Seivertson's apprehensions concerning Seivertson's lack of observations of the CI approaching and leaving the alleged crack house, STANFIELD "would have disclosed them to the magistrate" or would not have gone forward with affidavit. STANFIELD was very "upset Seivertson didn't tell him" about these material apprehensions.

Even as late as the day of the raid on April 28, 1989, STANFIELD's doubts that 3340 Santa Cruz Way (the Petitioner's residence) was the correct house was so great, that he admittedly took "extreme measures" and delayed the raid and Swat team for approximately 20-30 minutes to obtain from Farnsworth, (the trainee), confirmation that the buy had occurred at 3340 Santa Cruz Way. STANFIELD's own doubt as to what house the CI went to was also never disclosed to the magistrate.

Farnsworth (a trainee) testified that he could only verify where the car was parked (CI's vehicle), and could not verify "that was where the drugs were purchased at."

Farnsworth also stated that he also had anxiety whether the raid was at the right location before the raid began. Farnsworth also observed Seivertson also had this same anxiety. When Farnsworth's assistance was requested in filling out the affidavit concerning which house the CI actually went into, Farnsworth was unable to verify anything except where the CI had parked his car. On the day of the raid, STANFIELD tried to eliminate the CITY's "specific doubt" as to what house the CI went up to. STANFIELD made the final decision to go forward with the raid based on his claim that Farnsworth said, "That's the house", however, that is in direct contradiction to Farnsworth's sworn

testimony Farnsworth testified he could only verify where the CI's car was parked and could not verify if ". . . that was the house where the drugs were purchased at." Justifying the use of Farnsworth, for verification purposes, STANFIELD stated that Farnsworth (the trainee) was with Seivertson (the detective) when Seivertson made his observations of the "buy" and that Farnsworth was the closest thing he had on the day of the raid to verify the correct house because Seivertson wasn't available. STANFIELD testified that Farnsworth's confirmation was "<u>better than nothing</u>."

There existed within the Police Department at the time of this buy and raid, written operating instructions detailing the proper use of CI's and proper procedures for "controlled buys." The applicable regulations required

verification and/or corroboration before the officers could attempt to obtain a search warrant. These regulations listed at least eight suggested methods of verification, to include such things as utility checks on the residence, physically driving the CI past the residence prior to the raid for a physical verification of the proper home etc.

In judicially admitted answers to request for admissions, Respondents admitted that they did not accomplish any of the suggested methods of verification or any other verification and/or corroboration.

2. Basis For Federal Jurisdiction In The Court Of First Instance

The federal question sought to be reviewed (the Fourth Amendment violation) was raised initially in the Superior Court of the State of California, County of

Sacramento during the Franks' hearing. The court's ruling in that hearing and the resultant dismissal of the 42 USC 1983 claim is the genesis for this appeal.

The Petitioner then sought review and a rehearing in the California Court of Appeal, Third District, both of which were denied. A petition for review in the Supreme Court of California was denied by a three judge panel of that court with Judge J. Mock dissenting.

REASONS FOR ISSUING A WRIT OF CERTIORARI

ARGUMENT

The Petitioners submit that there are special, compelling, and important reasons for granting certiorari on the issues presented in this case. Petitioners submit that the "war on drugs" should not be used as an excuse to trample the rights of minority members of society living in economically deprived neighborhoods.

Police officers should not be given the message that, although they may entertain serious apprehensions as to the residence where contraband allegedly came from, they cannot ignore those doubts and trample economically deprived minority's constitutionally protected rights by breaking into their homes.

WHY REVIEW SHOULD BE GRANTED

A. All Officers Admitted That They Entertained Serious Doubts Or Apprehensions As To The Truth Of The Material Allegation In The Affidavit Supporting The Search Warrant. This was Direct, Unrefuted Evidence Of Reckless Disregard For the Truth Of The Affidavit.

The mechanics of a Franks' hearing was initially described in Franks v. Delaware 438 U.S. 154 (1978). It held that a court, when entertaining a sub-facial challenge to an underlying affidavit in a Franks' hearing must excise

the intentional or "recklessly" false material misrepresentations in the affidavit and/or add to the affidavit with the intentional or "reckless" material omissions. (People v. Maestas (1988) 204 Cal.App.3d 1208, 1216.)

It focuses on whether or not ". . . the magistrate or judge in issuing the warrant was mislead by information in the affidavit that the affiant knew was false or would have known was false except for his 'reckless disregard' of the truth . . ." (U.S. v. Stanert 762 F.2d 775, 780 (9th Cir. 1985).)

Necessarily, the term "reckless disregard for the truth" is of critical importance.

In U.S. v. Davis 617 F.2d 677, 694 (D.C. Cir. 1979) the court defined the problem surrounding this term created by a lack of direction from this court:

> "Unfortunately, the Supreme Court in Franks' gave no guidance concerning what constitutes a reckless disregard for the truth in Fourth Amendment cases, except to state that 'negligence or innocent mistake [is] insufficient.'"

The Davis Court at 694 drew an analogy upon precedents in the area of libel and the First Amendment.

> "By way of analogy, however, we can draw upon precedents in the area of libel and the First Amendment. In St. Amant v. Thompson 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), cited with approval in Herbert v. Lando 441 U.S. 153, 156, 99 S.Ct. 1635, 1639, 60 L.Ed.2d (1979), the Court observed that reckless disregard for the truth requires a showing that the defendant 'in fact entertained serious doubts as to the truth of his publication.'" (Emphasis added.)

The Seventh Circuit in U.S. v. Williams 737 F.2d 594, 602 (7th Cir. 1984) agreed with the District of Columbia Court in U.S. v. Davis, supra:

> ". . . that the First Amendment definition should be applied by analogy in the Franks setting. Accordingly, to prove reckless disregard for the truth, the defendants had to prove that the affiant 'in fact entertained serious doubts as to the truth of his' allegations. [Citations omitted.] Because states of mind must be proved circumstantially, a fact finder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." [Citation omitted.] (Emphasis added.)

What St. Amant v. Thompson 390 U.S. 727, 731 (1967) as cited in U.S. v. Davis, supra and U.S. v. Williams, supra, tell us is that rarely do you have direct evidence that the Defendants acted while entertaining "serious doubts as to the truth of their allegations; rather, the courts must infer from circumstantial evidence a reckless disregard from circumstances evincing "obvious reasons to doubt the veracity of the allegations."

U.S. v. Williams, supra 737 F.2d at p. 602.

In this case, however, there is direct evidence and significant "circumstantial" evidence that Respondents acted with reckless disregard for the truth, (e.g. the affidavit inferred a "controlled" buy when Defendants knew, according to their own standards and practices it was not a "controlled" buy; the method and manner of observation of the "controlled" buy was extremely questionable; the Defendants withheld information concerning an adult black male which, by Defendants own definition, made a "controlled" buy impossible; and, the area of unobserved activity did not consist merely by a three-foot radius near the "front porch," but rather encompassed the public sidewalk and street area of Santa Cruz Way and included the

confidential informant's unobserved, close contact with others (i.e. the adult black male in the CI's vehicle).

More importantly, Petitioners did more than provide "circumstantial" evidence for the court to "infer" Respondents had "obvious reasons to question the veracity of the allegations," Petitioners provided direct admissions that the Respondents "entertained serious doubts as to the truth of their allegations" which certainly evinced obvious reasons "to doubt the veracity" of the allegations. U.S. v. Williams, supra, 737 F.2d at p. 602.

The essence or absolute core of the "reckless disregard" standard is whether or not the Respondents, according to the interpretations of this Court's rulings, "entertained serious doubts as to the

truth" of their allegations." (St. Amant v. Thompson, supra, 390 U.S. at p. 731.)

As the court in U.S. v. Williams, supra, said at 602, a fact finder may circumstantially infer reckless disregard from circumstance that evidence "obvious reasons to doubt the veracity" of the allegations, or, put in another way, did the Respondents have "obvious reasons to doubt the veracity" of the allegations in the affidavit?

Petitioners presented actual admissions from each and every police officer that took part in obtaining this illegal warrant that they "entertained serious doubts" about the central issue in the case (i.e., which house the confidential informant purchased drugs from).

Seivertson admitted that he was "apprehensive" because he lost sight of

the CI and could not see which house the CI went into.

STANFIELD, the actual affiant, admitted that Seivertson's failure to disclose his "apprehensions" was a material misrepresentation to him and that this information "should have been disclosed to him."

STANFIELD, to a large extent, based the affidavit upon what he believed to be Seivertson's observations. STANFIELD also testified that if he knew about Seivertson's apprehensions because Seivertson lost sight of the CI, STANFIELD would have disclosed them to the magistrate. More significantly, STANFIELD admitted that he would not have gone forward to obtain the affidavit if these apprehensions of Seivertson were disclosed to him. STANFIELD was very upset Seivertson didn't tell him about

Seivertson's material apprehensions. STANFIELD admitted that he also had anxiety (before the raid began) whether the raid (based on his affidavit) was at the right location. STANFIELD also observed Seivertson had this same anxiety. Thus, it is not even necessary for the court to "infer reckless disregard" from circumstance evincing "obvious reasons to doubt the veracity" of the allegations. (U.S. v. Williams, supra, 737 F.2d 602, 603.) Each and every one of the officers that contributed to the affidavit and who participated in the buy directly admitted that they, in fact, entertained serious doubts as to the truth of the allegations.

If this were not enough, Officer Farnsworth's assistance was requested in filling out the affidavit underlying the search warrant to discover if at least one officer knew which house the CI actually

went into to purchase drugs. Farnsworth was unable to verify anything about the house. Even on the day of the raid, Farnsworth could not verify the house where the purchase occurred; the best he could do was verify where the CI had parked his car. This fact was known to the affiant, STANFIELD, who also didn't observe the purchase.

Most egregious is that even on the day of the raid, STANFIELD admitted that he still had such significant; serious doubts as to the truth of the allegations (i.e., which house the drugs were purchased from) that he took "extreme measures" in an attempt to determine which house on Santa Cruz Way was the house where drugs were purchased because STANFIELD was still unsure (i.e. he entertained serious doubts as to the truth of the allegations in the affidavit) of

the veracity of the allegation in the affidavit. Even with this admitted, serious continuing doubt as to the truth of the allegations in the affidavit, STANFIELD, recklessly chose to break into this Oak Park residence. On the day of the raid, STANFIELD held an entire SWAT team in abeyance for 20 to 30 minutes so Farnsworth could verify, as STANFIELD said ". . . the house that the informant had gone up to.") Farnsworth, of course, as was previously known to STANFIELD, could only verify where the CI's car was parked, not which house the CI went up to. In spite of these serious apprehensions and failure to obtain confirmation, Petitioners' home was broken into and its contents destroyed and trashed. This turned out to be the wrong house; confirming the illegality of the affidavit

and the validity to the officers' serious apprehensions of what they allegedly saw.

In an egregious lie, STANFIELD stated that Farnsworth said "that's the house." However, that is in direct contradiction of Farnsworth's sworn testimony that Farnsworth could only verify where the car was parked not where drugs were purchased. Farnsworth could not verify . . . that was the house where the drugs were purchased at." STANFIELD recklessly, callously and cavalierly attempted to justify the use of Farnsworth to verify which house the CI went up to (even though he knew that Farnsworth could not verify said information), by saying that, on the day of the raid, Farnsworth was "better than nothing." This not only is "reckless disregard for the truth," but also a callous disdain for the rights of the citizens of this neighborhood.

This is not merely "circumstantial" evidence of the fact the Respondents entertained serious doubts as to the truth of their allegations, it is a direct admissions, that not only did all three officers entertain serious doubts as to the truth of their allegations, but that they then willfully chose not to act on those serious doubts; choosing rather to proceed with the raid without alleviating these serious doubts they had as to what house the CI purchased the drugs.

The California Supreme Court erred when it approved the language of the California Court of Appeals which said, "However, these [admitted serious doubts as to the truth of the allegations] are not facts relevant to probable cause, but simply matters bearing on the strength to be afforded the testimony of these witnesses regarding their identification

of the premises." Using that logic, even if the Respondents had admitted in the precise language of St. Amant v. Thompson, supra, 390 U.S. at p. 731, they entertained serious doubts as to the truth of the allegations," the California Supreme Court would have presumably ruled that also was "not . . . relevant to probable cause, but simply matters bearing on the strength to be afforded the testimony of these witnesses regarding their identification of the premises."[1/] Petitioners contend that this ruling by the California Supreme Court is erroneous and cries for reversal.

---

1. More probably, these manifestations of their uncertain state of mind were a direct product of their reckless disregard for the truth.

B. Good Faith Immunity Does Not Lie When The Officers Who Authored The Affidavit Admitted They Entertained Apprehensions About The Key Issue From What House The Drugs Were Allegedly Purchased.

Based on the above-mentioned argument, it would be a mis-application of the document of good faith immunity to allow officers who admitted they entertained serious apprehensions about which house the drugs came from, (the same officers who conducted the raid) to claim that their acts were done in good faith. These same officers who had serious apprehensions concerning whether or not the CI had actually obtained drugs from 3340 Santa Cruz Way (the Petitioner's residence) were the same officers who conducted the raid that constituted the illegal search and seizure complained of by Petitioners.

It would stand the animus of good faith immunity on its head to allow officers who entertained serious doubts as to the truthfulness of the contents of the affidavit to now claim that they relied "in good faith" on the affidavit when they violated Petitioner's Fourth Amendment rights against illegal search and seizure. A granting of good faith immunity would be a "carte blanche" license for officers, who admittedly entertained serious doubts as to the truth of material allegations in a search-warrant, to then claim that the serious doubts of the truth of their allegations was merely "a product of balancing the testimony of various witnesses concerning the identification of the premises, as the lower Courts held, rather than a product of their reckless disregard for the truth.

Now any police officer who entertained serious doubts as to the truth of material allegations in the underlying affidavit could still be afforded the defense of good faith immunity. This approach would denude the Fourth Amendment and render it inutile.

Here, the police have greater culpability than an officer merely obtaining a warrant based on a "bare bones" affidavit executed by innocent colleagues. In this case, there were no "innocent" colleagues who either authored or executed the affidavit. STANFIELD not only knowingly conveyed material misrepresentations/omissions of others but also recklessly, intentionally and actively participated in the

misrepresentations/omissions to the magistrate.[2/]

In the Tillman-Brown case, there is no barrier or separation between the affiant and the executing officer. The affiant in this case cannot therefore claim good faith and unknowing reliance upon misrepresentation in the affidavit and warrant. In this case, the reasonable and well-trained officer standard is applied, but here the officer is both the affiant and the person who executed the

---

2. In his testimony, Stanfield admitted he did not disclose the presence of the adult black male even though he knew he was "in" the CI's car. Seivertson stated in his testimony that Stanfield had even told the DA about the adult black male in the CI;s car. Stanfield was also told the exact position of the CI when Seivertson lost sight of/reacquired him, but he also misrepresented this significant difference in the affidavit. Lastly, Stanfield knew he had doubts about the "buy" (as did all the other officers) yet also failed to disclose this fact in the affidavit. (supra.)

warrant. STANFIELD, is charged with the knowledge, duties and responsibilities of (all officers and those of any executing officer. Also, under the appropriate test, STANFIELD'S subjective belief in the uncorroborated affidavit is irrelevant. Rather, the court must look to "all of the circumstances" and facts a reasonably well-trained officer would examine both in the corrected affidavit and what "the officers" should have observed, disclosed and considered as participants in the uncontrolled buy, the preparation of the affidavit, and the execution of the warrant.

In People v. Johnson, supra., (1990) 220 Cal.App.2d at p. 748 the court held a good faith defense does not exist if intentional and/or reckless material misrepresentations/omissions were used to obtain the warrant:

> Appellant argues the search was illegal because Munoz did not execute the warrant with a good faith belief in its validity. In United States v. Leon (1984) 468 U.S. 897 [citation omitted], the Supreme Court held that evidence may not be suppressed if the officer executing the warrant relies in good faith on a warrant issued by a detached and neutral magistrate, that later is determined to be invalid. An officer will have no reasonable grounds for believing the warrant was properly issued where the magistrate was mislead by information in an affidavit which the officer knew or should have known was false, where the magistrate wholly abandoned his role, where the affidavit" [here the reconstructed affidavit] "was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable, or when the warrant was so facially deficient that the officer could not reasonably presume it to be valid." (emphasis added)

Here, three of the four exceptions (exception 1, 3 and 4) to the "good faith

belief" defense set forth in Leon, supra. apply.[3/]

It is clear that neither the affiant nor the government entity have a basis to claim a "good faith exception" if the affidavit contained misrepresentations. This is a far lesser standard than the requirement that the misrepresentations be material as they were for the Franks portion of this case. People v. Maestas (1988) 204 Cal.App.3d 1208, 1216-1217 so stated:

---

3. Stanfield knew or should have known (Exception, 1) the magistrate was misled by the false information in the affidavit; (Exception, 3) knew or should have known the affidavit, once the material misrepresentations/omissions were removed/added was so lacking in indicia of probable cause as to render belief in it entirely unreasonable; and, (Exception, 4) knew or should have known that the warrant was so facially deficient in particularizing the place (the court has already found that no drugs were found at 3340 Santa Cruz Way) that no reasonably well-trained officer would believe there was probable cause.

Thus, in cases such as this one in which it is alleged that the affidavit contained material misstatements and omissions, Leon and Franks may both apply. This overlap should not be permitted to obscure the fact that a Franks hearing is very different from a good faith hearing. Under Franks the critical question is whether an intentional or reckless misrepresentation in a search warrant affidavit was material in the issuing magistrate's determination of probable cause. If a defendant establishes by a preponderance of the evidence that the affiant intentionally or recklessly included false material in the search warrant affidavit, the reviewing court must excise that information and determine if the information remaining in the affidavit still supports a finding of probable cause. (Id., at pp. 155-156 [57 L.Ed.2d at p. 672].) Similarly, the reviewing court must add to the affidavit intentional or reckless omissions and reevaluate the determination of probable cause in light of this new information. Thus, the starting point of a Franks hearing is always a search warrant affidavit that on its face supports a finding of probable cause.

Unlike a Franks hearing, a good faith hearing under Leon starts out with an affidavit previously found not to establish probable cause [Here the reconstructed affidavit], and the burden is on the prosecution, not the defense. Furthermore, whereas the critical issue at the Franks hearing is whether the magistrate was actually misled by an intentional or reckless misstatement or omission, suppression remains appropriate under Leon if, entirely apart from whether dishonest or reckless misrepresentations actually misled the magistrate, the officer "could not have harbored an objectively reasonable belief in the existence of probable cause." (Leon, supra. 468 U.S. at p. 926 [82 L.Ed.2d at p. 701].) **Whether a well-trained officer could have harbored such an objectively reasonable belief may turn on whether the officer's affidavit contains any misstatements or omissions, as an officer who misrepresents the facts to the magistrate has less reason to believe in the existence of probable cause than an officer who makes no such misrepresentation. In other words, misstatements or omissions in the affidavit may bear upon whether the officer's belief in the existence of probable cause was objectively**

> reasonable regardless of whether they were material to the magistrate's probable cause determination under Franks. (United States v. Boyce (D.Minn. 1985) 601 F.Supp. 947, 955.) As Malley v. Briggs, supra., 475 U.S. 335, makes clear, the conduct of the magistrate is not to be considered in judging the objective reasonableness of the warrant application. Simply stated, the element of materiality is essential to the first of the four situations in which Leon declares that suppression is still proper, but not to the third situation, which is the one relied upon in this case." People v. Maestas (1988) 204 Cal.App.3d 1208, 1216-1217. (emphasis added)

Here, Respondents also rely on the third situation set forth in Leon, supra., at 923. The court must reconstruct the affidavit removing/adding the material misrepresentations/omissions and then add/remove all misrepresentations/ omissions, even though not material, before it determines whether or not STANFIELD'S belief in the existence of

probable cause was objectively reasonable (See fn. 24 of Leon, supra.).

The original affidavit, which is the subject of this court proceeding, essentially contained only two basis for probable cause: (1) information that was attributed to the "untested" informant; and, (2) the abortive attempt at corroboration by police work evinced by the alleged "controlled buy" on April 18, 1989, (as required by Higgason v. Superior Court (1985) 170 Cal.App.3d 929, 946. See also, Maestas, supra., at 1220; People v. Fein (1971) 4 Cal.3d 747, 752). When the Superior Court, in the Franks' portion of the proceeding, removed/added the material misrepresentations/ omissions, the attempt at corroboration via the "controlled buy" was eviscerated; leaving only the information attributed to the "untested" informant, most of which

was refuted by the informant himself in his deposition testimony.

> Because it is or should be self-evident that the unverified story of an untested informer is ordinarily unreliable (Higgason v. Superior Court (1985) 1780 Cal.App.3d 929, 946, 952 [216 Cal.Rptr. 817] (conc. opn. of Crosby, J.)), the police bear a heavy and very well-known responsibility to independently substantiate such information. It is well settled that information from an untested or unreliable informant does not establish probable cause unless it is "corroborated in essential respects by other facts, sources or circumstances." (People v. Fein (1971) 4 Cal.3d 747, 752 [94 Cal.Rptr. 607, 484 P.2d 583].) People v. Maestas, supra., 204 Cal.App.3d at 1220.

Here, the affidavit is barren of any information concerning the reliability of the informant and, when the affidavit is reconstructed to remove/add the material misrepresentations/ omissions concerning the "buy", there remains nothing but a "bare-bones" conclusory affidavit that

does not have any indicia of probable cause. The affidavit failed to state the untested informant had previously made any controlled narcotics buy for the CITY, whether the CITY had used this informant before, or whether the informant had ever provided factual information on any previous occasion.

Clearly STANFIELD could not have an "objectively reasonable" belief in the existence of probable cause when all the misrepresentations/omissions (material or not) are removed/added to the affidavit.

C. It Was A Mistake Of Law For The Supreme Court Of The State Of California To Approve The Trial Court's Decision To Add To STANFIELD's Affidavit Facts To Support An Inadequate Affidavit That STANFIELD Was Ignorant Of At The Time Of His Affidavit.

The original affidavit stated "Sergeant Seivertson told me [STANFIELD] that Sergeant Seivertson lost sight of the

CI's approach of the front door at 334 Santa Cruz Way." The trial court revised this to read "Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI when the CI was about half way between the sidewalk and the front door or porch area of the first house south of the vacant lot on Santa Cruz Way."

The appellate court agreed and the California Supreme Court confirmed that, ". . . it is true there is no evidence in the record Seivertson informed STANFIELD he lost sight of the CI when he was half way to the door."

Although it is proper, in a Franks' hearing, for the reviewing court to add inculpatory information to the affidavit, there are certain logical, constitutional restrictions placed thereon:

> "It is further plain that if a challenger is permitted to marshall all exculpatory facts, fairness dictates that the government be allowed to support the affidavit with additional inculpatory information **known** to the affiant at the time the affidavit was made. [Citation omitted.] (U.S. v. Williams, supra, 737 F.2d at p. 604.)

There was not scintilla of evidence (as the state courts admitted) that Seivertson ever informed STANFIELD that he last saw the CI when he was halfway to the door.

The courts ruled that the affidavit can be appended to ". . . include facts reasonably known to any government agent involved in a transaction, not just the affiant." The court cites as authority for this premise Franks v. Delaware, supra, 438 U.S. at p. 165, fn. 6 and U.S. v. DeLeon 979 F.2d 761, 763-764 (9th Cir. 1992). Petitioners contend this is reversible error.

It is true that "the Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on the affiant. (U.S. v. DeLeon, supra, 979 at p. 763.) The DeLeon rational has its genesis in footnote 6 of the Franks' decision. In footnote 6 of the Franks' decision, the court explained its logic that the Fourth Amendment placed restrictions on the government entity rather than on an individual officer as being motivated by the fact that any different rule would "permit government officials deliberately to keep from affiant or the court information material to the determination of probable cause." (Id. at pp. 763-764.) In other words, the rational of footnote 6 in Franks and the discussion in DeLeon, was that police should not be able to ". . . insulate one officer's deliberate misstatements merely

by relaying it through an officer-affiant personally ignorant of its faults." (Id. at p. 764.)

Clearly, this rational is for the protection of the citizen's Fourth Amendment rights. To allow the trial court to append the affidavit of an affiant to include inculpatory information not known to the affiant at the time the affidavit was made, would be contrary to the reasons expressed in footnote 6 of Franks. Rather than protect the citizen's Fourth Amendment rights, the government would now be able to, under the rational of the courts that have considered this case so far, shore up years later a deficient hearsay affidavit with information unknown to the affiant when he wrote the deficient affidavit. If STANFIELD did not know at the time he completed the affidavit that Seivertson

had seen the CI "halfway between the sidewalk and the front door or porch area . . ." it is a blatant misrepresentation to affirm that, both in the original affidavit and the affidavit as revised by the lower court.

Contrary to the California courts' rational, the revised affidavit could not have stated truthfully that "Seivertson saw the CI at this location" because Seivertson didn't author the affidavit. It was error for the appellate court to add this to the revised affidavit "that Seivertson saw the CI at this location" or that "he told STANFIELD that he saw him there" as interchangeable. STANFIELD was the affiant and, because he did not see the CI approach the house where the drugs allegedly were purchased, he must rely upon the hearsay statements of Seivertson. If Seivertson never told STANFIELD that he

saw the CI halfway between the sidewalk and the front door or porch area, before the original affidavit was written, then it was a misrepresentation to have that language included in the revised affidavit. The purpose of footnote 6 in the Franks' decision is to protect the citizen from unwarranted searches, not to allow the expost facto creation of probably cause by government's adding to the affidavit facts unknown to the affiant at the time the affidavit was made.

The CITY here cannot insulate itself from liability from deliberate misstatements by attributing inculpatory statements to an officer affiant who was personally ignorant of that information at the time the affidavit was made. STANFIELD did not see the CI either coming to or going from the house where the drugs were allegedly purchased. Out of

necessity, for any information to appear either in the original or in the revised affidavit authored by STANFIELD, this must have been told to STANFIELD by Seivertson, but it was not.

The rational of footnote 6 of Franks is not reversible. Although it is true that exculpatory information known to all officers at the scene at the time of the affidavit is attributable to the affiant and cannot be withheld from the affidavit, the reverse is not true, otherwise, all Fourth Amendment protection is a figment. Inculpatory information that was not known to the affiant at the time of the affidavit is not, by any law, allowed to be included in the revised affidavit; otherwise, the time consuming and bothersome formality of writing and submitting an affidavit to obtain a warrant before the raid can be dispensed

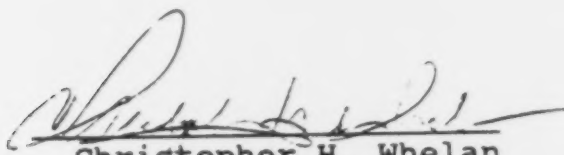
with. In the present case, the trial court would have to had authored a second affidavit but in Seivertson's name, to add his observations not disclosed to STANFIELD (or not observed) as part of its Franks' revision.

CONCLUSION

For all the foregoing reasons, Petitioners submit that the writ of certiorari should be issued and request that the court over rule the decision of the Supreme Court of the State of California respectfully submitted.

Respectfully submitted,

Leo F. Donahue
Attorney at Law
11246 Gold Express Drive, #100
Gold River, CA 95670
(916) 635-5577
Attorney for Petitioners



Christopher H. Whelan
Attorney at Law
11246 Gold Express Drive, #100
Gold River, CA 95670
(916) 635-5577
Attorney for Petitioners

APPENDIX A

TERRI TILLMAN-BROWN and DONOVAN BROWN,

Plaintiffs,

v.

CITY OF SACRAMENTO, DETECTIVE STANFIELD, and DOES 1 through 200, inclusive,

Defendants.

No. 513950

FRANKS HEARING FINDINGS

A. INTRODUCTION.

1. FACTUAL FINDINGS:

a. The street address of Plaintiffs' house is 3340 Santa Cruz Way. It is on the West side of the street and is the first house South of a vacant lot situated at the Southwest corner of Santa Cruz Way and 8th Avenue. The street address of the second house South of this vacant lot on the same side of the street as Plaintiffs' house and located adjacent to and directly

South of Plaintiffs' house is 3362 Santa Cruz Way.

b. On April 18, 1989, a confidential informant (CI) bought rock cocaine from persons located inside the house at 3362; no drugs were purchased by the CI at plaintiffs' house.

c. On April 24, 1989, a search warrant affidavit (SWA) based, in part, upon such buy was signed by Defendant Detective Stanfield (hereafter "Stanfield" or "affiant"), presented to the magistrate, and a search warrant was issued for the search of 3340 Santa Cruz Way. On April 28, 1989, the search warrant was executed and Plaintiffs' residence was searched.

d. The identification of 3340 rather than 3362 as the address where the CI purchased the drugs on April 18th was, in part, caused by the negligence of officer

Seivertson in making his observations of the CI's movements between the time the CI left his vehicle, made the drug buy, and returned thereto. It was also caused by officer Seivertson's making the report of such observations to the affiant in reckless disregard for the truth.

e. There is no evidence that the officers deliberately or intentionally misidentified the house to be searched.

2. WHAT IS (AND IS NOT) DECIDED.

a. The court has set forth below the search warrant affidavit starting with the first full paragraph on page 4 and ending with the last full paragraph on page 6, since Plaintiffs only challenge those portions of the affidavit.

b. The court has deleted parts of the affidavit and the language deleted is shown by strike through marks as follows: ~~**deleted**~~. The court has also made additions

to the affidavit and those additions are in **bold letters.**

c. If the court finds that information the court has deleted is based on deliberately false statements (DFS) or false statements made with reckless disregard for the truth (RFS) and if the court finds that true information added was a deliberate omission (DO) or was omitted in reckless disregard for the truth (RO), those findings are so indicated after the deleted or added language.

d. Since the court has found that plaintiff's house at 3340 Santa Cruz Way was not the house at which the CI bought the drugs, the court has deleted the references to the house but the house number except in the last 2 paragraphs **even though the court finds that <u>at the time</u> the affidavit was not deliberately**

false or inserted therein with reckless disregard for the truth or with the intention of misleading the magistrate.

e. The court has indicated by footnotes various findings of fact and legal determinations at appropriate places in the affidavit and they are part of the court's ruling in this case.

f. The court has not set forth evidentiary findings that form the basis for it's determinations on material facts included in or omitted from the affidavit. For instance, the court has not set forth, and is of the view it need not set forth, any determination of the locations of Officer Seivertson and the CI when Seivertson made his observations of the CI. The court is of the opinion that it needs only to determine whether or not the statement of such observations as set forth in the affidavit was, under all the

circumstances, a deliberately false statement or a statement made with reckless disregard for the truth.

B. THE AFFIDAVIT SHOWING THE COURT'S MODIFICATIONS.

"Between the dates of April 17 and April 20, 1989, I was contacted by a confidential informant (CI) who gave me information regarding the CI's knowledge of a location within the City of Sacramento that the CI knew rock cocaine was being sold from. Between the dates of April 17, 1989 and April 20, 1989, myself and Sergeant Seivertson of the Sacramento Police Department met with the CI and were told that the CI knew that the location to be ~~3340 Santa Cruz Way~~ **the first house next to the vacant lot south of 8th Avenue on Santa Cruz Way**. The CI told me that the CI had purchased rock cocaine from this location on no less that five (5) prior

occasions and has used the rock cocaine purchased from that location and had come under the influence of rock cocaine.

"After receiving this information, I asked the CI if the CI would be willing to make a controlled (fn 1) purchase of narcotics from ~~the location 3340 Santa Cruz Way~~ that location. "The CI stated that the CI would. The CI and the CI's vehicle were searched by members of the Sacramento Police Department for money contraband and the CI and the vehicle were checked negative for any money or contraband. I then gave the CI a specific amount of Sacramento Police Department funds to be used to attempt the purchase of rock cocaine.

"My self and Sergeant Seivertson followed the CI directly to ~~the~~ that area of 3340 Santa Cruz Way. Sergeant Seivertson told me ~~that he observed the CI~~

~~to exit the CI's vehicle and walk directly to 3340 Santa Cruz Way~~ (RFS) that he observed the CI to drive South of 8th Avenue on Santa Way and park his vehicle near the boundary of the vacant lot and the first house South of it and that he observed the CI to exit the CI's vehicle, walk in front of his vehicle, and into the yard area of that house toward the front door. (RO) "~~Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI as the CI approached the front door of 3340 Santa Cruz Way~~ (RFS) Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI when the CI was about half way between the sidewalk and the front door or porch area of the first house South of the vacant lot on Santa Cruz Way (RO) ~~and the CI was observed leaving this same area approximately 2 minutes later~~ (RFS) and

the CI was observed by his vehicle approximately 2 minutes later. (RO;fn 2) Sergeant Seivertson told me that ~~upon seeing the CI return, the CI walked directly back to the CI's vehicle, entered the vehicle, and left the area~~ upon seeing the CI by his vehicle he also observed a male black adult in the passenger seat of the CI's vehicle and a verbal confrontation took place between the CI and the male black adult and he then observed the male black adult to get out of the vehicle and the CI then left the area. (DO;Fn 3) Sergeant Seivertson and I followed the CI as the CI drove out of the area and again met with the CI away from the area.

"The CI gave me a quantity of off white hard substance that I have previously identified and recognized to be rock cocaine. The CI told me that the CI

had purchased the substance from the occupants of **the house of 3340** Santa Cruz Way. (fn 4) **He further told me that he did not get any dope from the male black adult who was in his truck and that he did not have any physical contact with this male black adult.** (DO;fn 5)

"The CI told me that the CI had driven directly to **3340 the first house South of the vacant lot on** Santa Cruz Way and the CI parked to that location and went directly to the front door of ~~3140 Santa Cruz Way~~ **the house.**(fn 6) The CI knocked on the door of ~~3340 Santa Cruz Way~~ **that house** and the door was opened by a male black adult approximately 35 years old. The CI entered the residence and the CI gave this subject a specific (fn 7) of United States currency which had been provided to the CI by this officer. This male black adult then went to another

subject, who was mostly hidden from the CI's view, and the subject then returned with a quantity of rock cocaine and gave it to the CI. The CI told me that the CI then exited the residence, walked directly back to the CI's vehicle, and **after having the confrontation with this black male adult who was then seated in his vehicle and after getting this black male adult to leave his vehicle,** (DO) left the area. The CI drove directly to a meet location with myself and Sergeant Seivertson. The CI told me that the CI was told that the CI could return and purchase additional quantities of the rock cocaine.

"I have personally spoken with the CI, and the CI has told me that the CI is familiar with the prices, terminologies, and effects of rock cocaine and has used rock cocaine on numerous occasions in the past.

"Sergeant Seivertson told me that he personally observed 3340 Santa Cruz Way to be a single story single family dwelling consisting of a light beige stucco with a green wood trim and a shake roof. Sergeant Seivertson told me that the numbers 3340 are affixed to the right side of the door and that there is a brick planter across the front of the house. (fn 8) Sergeant Seivertson told me that this is the ~~same house that he saw the CI approach and return~~ from first house next to the vacant lot South of 8th Avenue on Santa Cruz Way and it is the yard area of this house that he saw the CI walk into from his vehicle and in which he lost sight of the CI about half way between the side walk and the front door or porch area.

"Based on the information provided in this affidavit, I believe that rock

cocaine is currently being sold from 3340 Santa Cruz Way in the City and County of Sacramento."

****

FOOTNOTES

1. The court finds that the word "controlled" is an accurate and truthful expression of what the affiant and the other officers asked the confidential informant to do and was neither intentionally misleading nor inserted in the affidavit in reckless disregard for the truth.

2. The Court finds that the affidavit accurately reflected what Seivertson actually told the affiant. The part in **bold** above reflects the court's finding of what Seivertson honestly believed to be true and, to the extent it is different from what he told the affiant, the facts included in the

affidavit were made in reckless disregard for the truth. The court further finds, however, that Seivertson's observations which resulted in him mistakenly believing that the yard of the house in which he saw the CI "about half way between the sidewalk and the front door" was 3340 (ie- the house next to the vacant lot between which the CI parked his vehicle) were made with ordinary negligence and not in reckless disregard for the truth.

3 Although the contact with the black male adult was deliberately omitted from the affidavit in order to protect the CI's safety and that, in the court's view, is not a sufficient reason to jeopardize a citizen's 4th Amendment rights, there is no evidence whatsoever that this contact between the CI and the black male adult had anything to do with the CI's drug buy.

4. Although Officer Stanfield testified

that the CI told him what was in the affidavit and the CI testified that he didn't identify the house by the house number, the Court finds that the house was not identified by the CI to the Affiant by house number after the buy.

5. Since the Court has added to the affidavit the facts that the court has found to have been known by officer Seivertson about the CI's contact with the black male adult as if such facts had been told to the affiant (the court finds they were not), the Court has added the other facts told to the affiant by the CI in order to complete the picture. In any event, as stated in fn 3, the court finds that this contact with the black male adult was not material to the determination of probable cause and although deliberately omitted did not affect the "truthfulness" of the affidavit

in the Franks' sense. **Franks v. Delaware** 438 US 154, 165, 57 L Ed 2d 667, 98 S Ct 2674.

6. The court finds the CI did not tell the officers that he went to the second house South of the vacant lot and that he did not give them a house number but instead, when questioned, confirmed the affiant's erroneous understanding of the location of the house from which he purchased the drugs. The CI's deposition is replete with testimony by him in which he adopts the suggestion in a leading question or gives an equivocal answer to such questions. (For instance, in his deposition at page 120 he testifies as follows: "I wouldn't have said the word 'jukebox.' It might have been told to me, saying is it a jukebox type thing, and I might have said yes.") Although the officers were negligent in not making

absolutely sure which house was the correct house, the court finds that they did not act with reckless disregard for the truth. 7. Typographical omission of the word "amount."

8. Although this description is not entirely accurate it clearly describes Plaintiffs' house at 3340 and not the one next door at 3362 where the CI actually purchased the drugs.

Dated: December 21, 1992.

A. RICHARD BACKUS

JUDGE OF THE SUPERIOR COURT

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TERRI TILLMAN-BROWN and DONOVAN BROWN,

Plaintiffs,

v. No. 513950

C I T Y O F S A C R A M E N T O, D E T E C T I V E STANFIELD, et al.,

Defendants.

THE SEARCH WARRANT AFFIDAVIT STARTING WITH FIRST FULL PARAGRAPH ON PAGE 4 AND ENDING WITH THE LAST FULL PARAGRAPH ON PAGE 6 AS MODIFIED BY THE COURT

"Between the dates of April 17 and April 20, 1989, I was contacted by a confidential informant (CI) who gave me information regarding the CI's knowledge of a location within the City of Sacramento that the CI knew rock cocaine was being sold from. Between the dates of

April 17, 1989 and April 20, 1989, myself and Sergeant Seivertson of the Sacramento Police Department met with the CI and were told that the CI knew that the location to be **the first house next to the vacant lot south of 8th Avenue on Santa Cruz Way.** The CI told me that the CI had purchased rock cocaine from this location on no less that five (5) prior occasions and has used the rock cocaine purchased from that location and had come under the influence of rock cocaine.

"After receiving this information, I asked the CI if the CI would be willing to make a controlled purchase of narcotics from that location. The CI stated that the CI would. The CI and the CI's vehicle were searched by members of the Sacramento Police Department for money or contraband and the CI and the vehicle were checked negative for any money or contraband. I

then gave the CI a specific amount of Sacramento Police Department funds to be used to attempt the purchase of rock cocaine.

"My self and Sergeant Seivertson followed the CI directly to that area of Santa Cruz Way. Sergeant Seivertson told me that he observed the CI to drive South of 8th Avenue on Santa Cruz Way and park his vehicle near the boundary of the vacant lot and the first house South of it and that he observed the CI to exit the CI's vehicle, walk in front of his vehicle, and into the yard area of that house toward the front door. Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI when the CI was a about half way between the sidewalk and the front door or porch area of the first house South of the vacant lot on Santa Cruz Way and the CI was observed

by his vehicle approximately 2 minutes later. Sergeant Seivertson told me that upon seeing the CI by his vehicle he also observed a male black adult in the passenger seat of the CI's vehicle and a verbal confrontation took place between the CI and the male black adult and he then observed the male black adult to get out of the vehicle and the CI the left the area. Sergeant Seivertson and I followed the CI as the CI drove out of the area and again met with the CI away from the area.

"The CI gave me a quantity of off white hard substance that I have previously identified and recognized to be rock cocaine. The CI told me that the CI had purchased the substance from the occupants of the house on Santa Cruz Way. He further told me that he did not get any dope from the male black adult who was in his truck and that he did not have any

physical contact with this male black adult.

"The CI told me that the CI had driven directly to the first house South of the vacant lot on Santa Cruz Way and the CI parked to that location and went directly to the front door of the house. The CI knocked on the door of that house and the door was opened by a male black adult approximately 35 years old. The CI entered the residence and the CI gave this subject a specific of United States currency which had been provided to the CI by this officer. This male black adult then went to another subject, who was mostly hidden from the CI's view, and the subject then returned with a quantity of rock cocaine and gave it to the CI. The CI told me that the CI then exited the residence, walked directly back to the CI's vehicle, and after having the

confrontation with the male black adult who was then seated in his vehicle and after getting this male black adult to leave his vehicle, left the area. The CI drove directly to a meet location with myself and Sergeant Seivertson. The CI told me that the CI was told that the CI could return and purchase additional quantities of the rock cocaine.

"I have personally spoken with the CI, and the CI has told me that the CI is familiar with the prices, terminologies, and effects of rock cocaine and has used rock cocaine on numerous occasions in the past.

"Sergeant Seivertson told me that he personally observed 3340 Santa Cruz Way to be a single story single family dwelling consisting of a light beige stucco with a green wood trim and a shake roof. Sergeant Seivertson told me that the

number 3340 are affixed to the right side of the door and that there is a brick planter across the front of the house. Sergeant Seivertson told me that this is the **first house next to the vacant lot South of 8th Avenue on Santa Cruz Way and it is the yard area of this house that** he saw the CI **walk into from his vehicle and in which he lost sight of the CI about half way between the side walk and the front door or porch area.**

"Based on the information provided in this affidavit, I believe that rock cocaine is currently being sold from 3340 Santa Cruz Way in the City and County of Sacramento."

Dated December 21, 1992.

A. RICHARD BACKUS
JUDGE OF THE SUPERIOR COURT

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TERRI TILLMAN-BROWN and DONOVAN BROWN,

Plaintiffs,

v.

C I T Y O F S A C R A M E N T O , D E T E C T I V E STANFIELD, et al.,

Defendant.

No. 513950 DEPT. 9

DETERMINATION OF PROBABLE CAUSE

The Court has examined the modified affidavit for search warrant under rules set forth in Illinois v. Gates 462 U.S 213, 238, 103 S.Ct. 2317, 76 L.Ed 2d 527, and finds that "... given all the circumstances set forth in the (modified) affidavit ..., there (was) a fair probability that contraband or evidence of a crime (would) be found in ..." the house next to the vacant lot on Santa Cruz Way

south of 8th Avenue, namely: 3340 Santa Cruz Way. That is, the Court finds that the affidavit as modified furnishes probable cause to search 3340 Santa Cruz Way.

DATED: DEC 23 1992

A. RICHARD BACKUS

JUDGE OF THE SUPERIOR COURT

APPENDIX D

CHRISTOPHER H. WHELAN, ESQ.
Attorney at Law
LEO F. DONAHUE, ESQ.
Attorney at Law
11246 Gold Express Drive, Suite 100
Gold River, California 95670
Telephone: (916) 635-5577
STATE BAR # 080823

Attorney for Plaintiffs, TERRI TILLMAN-BROWN and DONOVAN BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TERRI TILLMAN-BROWN and DONOVAN BROWN, Plaintiffs, v. CITY OF SACRAMENTO, DETECTIVE STANFIELD, and DOES 1 through 200, inclusive, Defendants.	No. 513950 JUDGMENT ON THE MERITS [Code of Civil Procedure § 582] Date: Nov. 9, 1992 Time: 8:30 a.m. Dept: 9 Trial Date: Cont.

On November 9, 1992, a Franks' hearing was held in this matter. After

extensive presentation of evidence both documentary and live testimony by the parties, the court, the Honorable Judge Backus presiding, issued its opinion that contained both findings of fact and conclusions of law. The Honorable Judge Backus, having heard all the evidence and with good cause ordered that the underlying affidavit originally dated April 24, 1989, was re-tested according to the standards set forth in Franks v. Delaware (1978) 438 US 154; 57 L.Ed.2d 667; 98 S.Ct. 2674 and contained facts sufficient to support a probable cause search of Plaintiff's residence at 3340 Santa Cruz Way on April 28, 1989.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that the action in its entirety is hereby dismissed with prejudice.

Dated: _____

_____
A. RICHARD BACKUS
JUDGE OF THE SUPERIOR COURT

This document dated January 12, 1993.

APPENDIX E

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In the underlying action, plaintiffs alleged, inter alia, violation of their civil rights (42 U.S.C. § 1983) as a result of the search of their residence pursuant to a search warrant. The complaint sought damages for emotional and economic injury.

Plaintiffs appeal from a judgment of dismissal entered following a hearing pursuant to Franks v. Delaware (1978) 438 U.S 154, 57 L.Ed.2d 667 at which the trial court ruled the affidavit supporting the search warrant, when properly revised, establishes probable cause. On appeal, plaintiffs contend the trial court erred

in concluding (1) the warrant is supported by probable cause, and in any event (2) the police officers involved in the search acted in good faith. Because we uphold the trial court's conclusion the search warrant affidavit as revised establishes probable cause, we shall not address plaintiffs' contention relating to good faith.

On April 18, 1989, officers of the Sacramento Police Department arranged for an undercover purchase of narcotics at a residence on Santa Cruz Way. After meeting with a confidential informant (CI) and providing him with money for the purchase, the officers followed the CI to the area and attempted to observe his movements as he approached the subject residence and later as he left the area. From their observations and discussions with the CI before and after the

transaction, the officers believed the purchase had taken place at the residence at 3340 Santa Cruz Way (the 3340 residence), which at the time was occupied by plaintiffs. However, the purchase had actually taken place at the residence next door at 3362 Santa Cruz Way (the 3362 residence). The officers obtained a search warrant for the 3340 residence. It was executed several days later.

Plaintiffs initiated this action against the City of Sacramento and Officer Dale Stanfield, the search warrant affiant, alleging violation of their federal civil rights and several state causes of action. The trial court granted defendants' motion for summary judgment as to the state law claims and conducted a Franks hearing to determine whether Stanfield's affidavit supplied probable cause to support the search warrant for

the 3340 residence. After the hearing, the court revised the search warrant affidavit to correspond with relevant information known or reasonably known to the officers at the time. The court concluded the affidavit established probable cause to believe there were narcotics at the 3340 residence. The court then dismissed plaintiffs' civil rights claim and this appeal followed.[4/]

I

Franks v. Delaware, supra, 438 U.S. 154 [57 L.Ed.2d 667] arose in the context of a state criminal prosecution. Franks

---

4. The record, perfected under California Rules of Court, rule 5.1, does not disclose the precise nature of the procedure which resulted in dismissal. The complaint alleges the City is vicariously liable. The answer sets up several affirmative defenses including immunity. We surmise the Franks hearing was in the nature of a bifurcated trial of special defenses pleaded in bar to the civil rights cause of action. (See Code Civ. Proc., § 597.)

holds that upon a substantial preliminary showing by defendant, the trial court must hold a hearing to determine whether the search warrant affidavit contains false statements made knowingly and intentionally or with reckless disregard for the truth, and whether such false statements are necessary to establish probable cause. If both questions are answered affirmatively, the court must strike the false statements and retest the affidavit for probable cause. If the affidavit is then insufficient, the warrant must be voided and the fruits of the search excluded. (438 U.S. at pp. 155-156, 57 L.Ed.2d at p. 672; United States v. Ippolito (9th Cir. 1985) 774 F.2d 1482, 1486-1487 fn. 1; United States v. Stanert (9th Cir. 1985) 762 F.2d 775, 780-781, amended, 769 F.2d 1410.) A Franks hearing also comprehends intentional or

reckless omissions of relevant facts which, if found, must be added to the search warrant affidavit and the affidavit then retested for probable cause. (People v. Costello (1988) 204 Cal.App.3d 431, 442; People v. Maestas (1988) 204 Cal.App.3d 1208, 1216; U.S. v. DeLeon (9th Cir. 1992) 979 F.2d 761, 763.)

Although this is not a criminal prosecution, a Franks hearing is appropriate to determine whether the warrant was supported by probable cause and thus whether Stanfield is immune from liability. "A police officer is qualifiedly immune from suit for damages arising from an illegal arrest or search unless 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.' Malley v. Briggs, 475

U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986). . . . (See Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); see also Hutchinson v. Grant, 796 F.2d 288, 290 (9th Cir.1986) ('A police officer has immunity if he arrests with probable cause.')" (Forster v. County of Santa Barbara (9th Cir. 1990) 896 F.2d 1146, 1147-1148.) If Stanfield is immune from liability, so also is the City whose liability is allegedly vicarious. (See e.g., Gov. Code, § 815.2, subd. (b).)

Plaintiffs do not contend Stanfield's affidavit, as written, fails to establish probable cause. They argue that information relevant to the existence or not of probable cause was intentionally or recklessly omitted and that false or misleading statements necessary to establish probable cause were

intentionally or recklessly included. The trial court found that certain parts of the affidavit should be deleted and that other material should be added. The court held the affidavit, as revised, established probable cause.[5]

Plaintiffs do not challenge the court's ultimate conclusion the revised affidavit establishes probable cause. Instead, they contend certain facts supportive of probable cause improperly were added to the affidavit while other facts were improperly excluded. They argue the affidavit, if revised according to their interpretation of Franks, would not establish probable cause.

Our task on review is to determine whether the several inclusions and

---

5. As noted previously, the court also concluded, gratuitously, that the officers acted in good faith.

exclusions ordered by the trial court are supported by the record. Because questions of what information was reasonably known to the officers and whether misstatements or omissions were intentional or reckless involve factual determinations and credibility issues, these are reviewed under a substantial evidence standard. (See U. S. v. Dozier (9th Cir. 1988) 844 F.2d 701, 705 [applying federal clearly erroneous standard]; People v. Jackson (1992) 10 Cal.App.4th 13, 18-21 [equating the federal clearly erroneous standard with the state substantial evidence test].) However, whether the various misstatements or omissions are necessary or relevant to probable cause involves a mixed question of fact and law and is subject to de novo review. (U. S. v. Dozier, supra, 844 F.2d.)

II

We view the evidence in the light most favorable to the judgment.[6] So considered, the evidence establishes the following: On April 18, 1989, three officers of the Sacramento Police Department met with the CI in the parking lot of a Safeway store for the purpose of arranging a controlled purchase of narcotics. The informant had earlier told the officers he purchased narcotics at a

---

6. In flagrant disregard of basic rules of appellate practice, plaintiffs in their briefs present a statement of facts so one-sided and misleading as to be totally useless for our purposes. In an appeal attacking the trial court's determination of factual issues, the evidence must be considered in the light most favorable to the judgment of the trial court. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal § 278, p. 289.) Instead, plaintiffs have recited only those facts favorable to their position. Furthermore, as will be detailed later, in several instances plaintiffs have recited "facts" either not supported by the record as cited or directly contradicted by other evidence.

house on "one of those San streets." At the meeting in the parking lot, the CI gave the general location of the residence as the first house next to a vacant lot on Santa Cruz Way. The 3340 residence is bordered on the north by a vacant lot and on the south by the 3362 residence.

After the CI and his vehicle were searched and the CI provided with money, he proceeded to the area. The three officers followed. Sergeants Seivertson and Farnsworth were in one vehicle and, Officer Stanfield, the affiant, was in another. Seivertson was to observe the transaction and report what he saw to Stanfield, who would then prepare a search warrant affidavit.

As the CI reached the area, he parked his vehicle along the curb on Santa Cruz Way at the boundary between the vacant lot and the 3340 residence. He got out, walked

around the front of his vehicle and headed toward what appeared to the officers to be the 3340 residence.[7] As Seivertson and Farnsworth drove by, the CI was already in front of his vehicle. Seivertson maintained visual contact with the CI through a rear view mirror as he and Farnsworth continued down the street. Just before Seivertson lost sight of him, the CI was half-way between the sidewalk and the door of what Seivertson believed to be the 3340 residence.

Seivertson and Farnsworth continued down the street, turned around, and came back to a point approximately one and one-half blocks from the 3340 residence. By that time, the CI had already made the

---

7. Although the testimony of the officers was that the CI was seen heading for the 3340 residence, it is now clear they were mistaken. Defendants do not dispute the CI purchased the narcotics at the 3362 residence.

purchase and was back on the sidewalk next to his vehicle. An unidentified black male was in the CI's vehicle. The CI appeared to argue with this individual for a short period during which the officers observed no physical contact or exchange between them. However, unbeknown to the officers, at some time during the conversation the CI gave the black male a portion of the narcotics he had purchased in order to get rid of him. The black male departed and the CI returned in his vehicle to the Safeway parking lot and met with the officers.

In the post-buy meeting, the CI informed the officers he purchased the narcotics from the first house after the vacant lot. He did not give the address.[8/]

---

8. Although Stanfield testified the CI gave the house number as well, the trial court concluded otherwise.

The CI told the officers the black male was trying to get a ride from him. The CI did not inform them he gave a portion of the narcotics to that individual. Because the officers believed there had been no physical contact between the CI and the black male, they decided not to include any reference to the black male in the affidavit in order to protect the CI's identity.

As previously agreed, Stanfield prepared an affidavit for search warrant. In the affidavit, Stanfield averred the officers met with the CI who informed them he had purchased narcotics in the past at "3340 Santa Cruz Way." Seivertson told Stanfield he saw the CI leave his vehicle but lost sight of him "as the CI approached the front door of 3340 Santa Cruz Way"; Seivertson then saw the CI again "leaving this same area

approximately 2 minutes later." The affidavit continued: "Sergeant Seivertson told me that upon seeing the CI return, the CI walked directly back to the CI's vehicle, entered the vehicle, and left the area." As indicated, no mention was made of the black male. The affidavit also recited the CI told Stanfield he purchased the narcotics at 3340 Santa Cruz way.[9/]

---

9. In pertinent part, the affidavit read: "Between the dates of April 17 and April 20, 1989, I was contacted by a confidential informant (CI) who gave me information regarding the CI[']s knowledge of a location within the City of Sacramento that the CI knew rock cocaine was being sold from. Between the dates of April 17, 1989 and April 20, 1989, myself (sic) and Sergeant Seivertson of the Sacramento Police Department met with the CI and were told that the CI knew the location to be 3340 Santa Cruz Way. The CI told me that the CI had purchased rock cocaine from this location on no less than five (5) prior occasions and has used the rock cocaine purchased from that location and had come under the influence of rock cocaine.

"After receiving this information, I asked the CI if the CI would be willing to make

a controlled purchase of narcotics from the location 3340 Santa Cruz Way. The CI stated that the CI would. The CI and the CI[']s vehicle were searched by members of the Sacramento Police Department for money or contraband and the CI and the vehicle were checked negative for any money or contraband. I then gave the CI a specific amount of Sacramento Police Department funds to be used to attempt the purchase of rock cocaine.

"My self [sic] and Sergeant Seivertson followed the CI directly to the area of 3340 Santa Cruz Way. Sergeant Seivertson told me that he observed the CI to [sic] exit the CI's vehicle and walk directly to 3340 Santa Cruz Way. Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI as the CI approached the front door of 3340 Santa Cruz Way and the CI was observed leaving this same area approximately 2 minutes later. Sergeant Seivertson told me that upon seeing the CI return, the CI walked directly back to the CI's vehicle, entered the vehicle, and left the area. Sergeant Seivertson and I followed the CI as the CI drove out of the area and again met with the CI away from the area.

"The CI gave me a quantity of off white hard substance that I have previously identified and recognized to be rock cocaine. The CI told me that the CI had purchased the substance from the occupants of 3340 Santa Cruz Way.

"The CI told me that the CI had driven

Following the Franks hearing, the trial court made a number of findings of fact concerning what information was known to the officers, whether misstatements and omissions in the affidavit were intentional or reckless, and whether the information misstated or omitted was necessary and relevant to probable cause.

---

directly to 3340 Santa Cruz Way and the CI parked to [sic] that location and went directly to the front door of 3340 Santa Cruz Way. The CI knocked on the door of 3340 Santa Cruz Way and the door was opened by a male black adult approximately 35 years old. The CI entered the residence and the CI gave this subject a specific [sic] of United States currency which had been provided to the CI by this officer. This male black adult then went to another subject, who was mostly hidden from the CI's view, and the subject then returned with a quantity of rock cocaine and gave it to the CI. The CI told me that the CI then exited the residence, walked directly back to the CI's vehicle, and left the area. The CI drove directly to a meet location with myself and Sergeant Seivertson. The CI told me that the CI was told that the CI could return and purchase additional quantities of rock cocaine."

Rather than set out these findings here, we shall to them as necessary in our discussion of plaintiffs' several contentions.

III

The trial court found the CI had not given the officers the street address of the house at which narcotics had been purchased in the past or on the day of the "controlled" buy. However, the court did find the CI identified the location as "the first house south of the vacant lot on Santa Cruz Way." The affidavit was revised accordingly. Plaintiffs contend this finding is contrary to the evidence because the only witness to testify unequivocally that the CI identified the house as the first one after the vacant lot was Stanfield, whose testimony it is argued was not credible. By contrast the CI, whose testimony, plaintiffs assert,

was impliedly accepted by the court, testified in deposition he told the officers the purchase had been made from either the first or second house after the vacant lot.

Plaintiffs misrepresent the evidence. Seivertson testified the CI told the officers before the buy that he had purchased narcotics from the first house south of the vacant lot. Later, Seivertson indicated he was unsure whether in their post-buy meeting the CI gave the officers an address of the house, but he was "absolutely" certain the CI described the house as the first one south of the vacant lot. Farnsworth testified that, at the meeting before the buy, somebody described the house as the first one after the vacant lot. However, he could not recall who said it. Farnsworth also heard this same description given at the

post-buy meeting.[10/]

Even ignoring Stanfield's testimony that the CI identified the house as not only the first after the vacant lot but also by street number, the foregoing testimony by Seivertson and Farnsworth is substantial evidence to support the trial court's finding. Furthermore, we reject plaintiffs' postulate that the trial court was obligated to ignore all of Stanfield's testimony simply because it did not accept portions of his testimony or because other portions conflicted with the testimony of other witnesses. We also reject

---

10. In their reply brief, plaintiffs assert "Farnsworth testified that he did not know the location to be the first house next to the vacant lot." They further assert "Farnsworth heard that the CI (in the pre-buy) meeting identified the location to be the first or second house south of the vacant lot." This version of the evidence is not supported by the record.

plaintiffs' argument the CI's testimony must be accepted in toto simply because the trial court accepted a portion of it.[11/] A trier of fact is free to accept one portion of a witness's testimony while rejecting another. (People v. Robinson (1964) 61 Cal.2d 373, 389.)

Plaintiffs also contend the court should have included in the affidavit Seivertson's erroneous description of the

---

11. In any event, plaintiffs' premise that the trial court necessarily accepted a portion of the CI's testimony is not supported by the record. Plaintiffs contend the court found the CI did not obtain the narcotics from the individual he found in his vehicle and did not have any physical contact with this individual. According to plaintiffs, the only testimony to support these findings came from the CI. This is not true. Seivertson testified that from his point of observation he saw no physical contact or exchange between the CI and the black male. It can easily be inferred if Seivertson saw no contact or exchange the CI did not obtain the narcotics from the black male.

3340 residence, including the fact Seivertson thought it had a chain link fence in front. However, this information was not relevant to probable cause. Although Seivertson described the 3340 residence to Stanfield as a light beige stucco with green wood exterior and a shake roof, in fact the residence was white with green trim and an asphalt roof.[12/] However, had Seivertson been referring to the 3362 residence, its actual description was at variance in respect to the same minor details as was the 3340 residence. As for the chain link fence, plaintiffs contend that, "when confronted with his deposition testimony, [Seivertson] confirmed that he believed there was a chain link fence in front of

---

12. There was in fact no chain link fence in front of the 3340 residence, but there was such a fence in front of the 3362 residence. (RT 597-598)

the [3340 residence]" and in front of the residence the CI was seen approaching. This is not supported by the record.

At the hearing, Seivertson acknowledged his deposition testimony that there was a chain link fence at the residence the CI was seen approaching. However, Seivertson did not confirm this testimony at the hearing. On the contrary, he unequivocally denied there was such a fence, indicating that at the time of his deposition he was unsure. He also recounted returning to the area after the buy to get a description of the residence and seeing there was no chain link fence. Seivertson explained that if there had been a fence he would have mentioned it in his description to Stanfield. He did not do so. Finally, photographs presented at trial show a chain link fence actually ran down both sides of the 3340 residence,

thus explaining why Seivertson might have been confused at the time of his deposition.

IV

Stanfield's affidavit stated Seivertson told him he observed the CI get out of his vehicle "and walk directly to 3340 Santa Cruz Way." The trial court revised this to read: "[Seivertson] observed the CI to exit the CI's vehicle, walk in front of his vehicle, and into the yard area of that house toward the front door." Similarly, the original affidavit recited: "Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI as the CI approached the front door of 3340 Santa Cruz Way." The court revised this to read: "Sergeant Seivertson told me that Sergeant Seivertson lost sight of the CI when the CI was about half way between the sidewalk and the front door or porch

area of the first house south of the vacant lot on Santa Cruz Way. . . ."

Plaintiffs contend the court erred in adding the latter reference to Seivertson's last sighting of the CI. They argue it is inappropriate in a Franks hearing to insert new information in the affidavit to support probable cause. According to plaintiffs, only facts intentionally or recklessly omitted are to be added, i.e., those which the authorities sought to keep out. Plaintiffs further contend the addition was inappropriate as Seivertson's testimony to this effect was not credible and there was no evidence the statement was ever communicated to Stanfield.

Plaintiffs misunderstand the nature and purpose of a Franks hearing. "Federal and state courts recognize that two types of corrections are envisioned in Franks:

(1) material misstatements are stricken and (2) material omissions are added. The aim in either case is not punitive but remedial --to make the affidavit read as it should have so that the reviewing court can then retest for probable cause support. To that end, correction of the affidavit should not take one form (striking or adding) to the exclusion of the other. Where . . . the defendant makes out a case for striking a misstatement, the proper remedy is to add back the true facts known to the affiant on that precise point, if revealed at the hearing, rather than strike and jettison the passage altogether. That approach is especially critical where, as here, simply striking the misstatements leaves material unstricken facts standing out of context and ungrammatically stated. Also, nothing in the rationale of Franks prevents a

court from editing a partially stricken sentence so that its remaining contents can stand on their own. Otherwise, we put form over substance and encourage affiants to state each fact dryly, in separate sentences, avoiding all subordinate and dependent clauses, compound subjects and other rudiments of effective writing." (People v. Costello (1988) 204 Cal.App.3d 431, 443444.)

The trial court deleted a broad and misleading statement that Seivertson lost sight of the CI as he was approaching the front door and added one which more accurately explained what Seivertson observed. Technically, the original statement was correct, as an approach may begin from any distance. Nevertheless, to the extent it suggested the CI was near the door the statement was misleading. In making the revisions, the trial court was

not eliminating a false statement but correcting a misleading one. This was appropriate.

Although it is true there is no evidence in the record Seivertson informed Stanfield he last saw the CI when he was halfway to the door, this is a red herring. Whether the revised affidavit recites that Seivertson saw the CI at this location or that he told Stanfield he saw him there, the result is the same. The important fact is where the CI was seen, not whether this sighting was communicated to others. As plaintiffs themselves urge, the affidavit must include facts reasonably known to any government agent involved in the transaction, not just the affiant. (Franks v. Delaware, supra, 438 U.S. at p. 165, fn. 6, 15 L.Ed.2d at p. 667; United States v. DeLeon (9th Cir. 1992) 979 F.2d 761, 763-764.)

Plaintiffs also contend Seivertson's statement the CI was last seen half-way to the door is not credible because his vantage point would not allow such an observation. Evidence presented at the hearing suggests Seivertson's last view of the CI occurred from a distance of one and one-half blocks through the rear view mirror of a moving car. In addition, Seivertson's vision was partially obscured by several intervening chain link fences.

Although Seivertson's vantage point is certainly relevant in determining the weight to be accorded his testimony, it does not discredit that testimony altogether. "Questions as to the credibility of witnesses and the weight to be given their testimony are for the trier of fact." (Hansen v. Bear Film Co., Inc. (1946) 28 Cal.2d 154, 184.) It is the trier of fact who must determine to what

extent a particular witness's testimony is to be believed or disbelieved. (Peirson v. Superior Court (1970) 8 Cal.App.3d 510, 518.) "An appellate court cannot substitute its judgment for that of the trial court on the facts unless the testimony as to a particular fact 'in the light of the undisputed facts, is so inherently improbable and impossible of belief as in effect to constitute no evidence at all.'" (Id., at pp. 518-519.)

Seivertson testified that after he drove past the CI he continued observing through the vehicle's rear view mirror. Seivertson saw the CI walk into the yard area of the home. Seivertson also testified he last saw the CI at a point half-way between the sidewalk and the front door. Although in an earlier deposition Seivertson testified this last sighting was from a block and a half away,

he testified at trial he must have misunderstood the question at his deposition. Seivertson acknowledged he could not have seen the CI through his rear view mirror from that distance.

Plaintiffs charge the court's finding in accordance with Seivertson's trial testimony ignores "a two year history of inconsistent and incongruent statements" by Seivertson regarding his observations. Again, the record does not support this charge. Three days after the warrant was executed, Seivertson prepared a statement in which he indicated the CI was "approaching the yard area of that location as [they] drove by." This is not inconsistent with Seivertson's trial testimony. At trial, Seivertson indicated the CI was approaching the yard area as they passed and was in the yard before they had travelled two or three car

lengths beyond. Although there was no mention in Seivertson's earlier statement that the CI was last seen half-way to the door, there is no statement to the contrary. Seivertson's testimony supports the court's finding and is not so inherently improbable as to constitute no evidence.

Finally, plaintiffs contend the court should have added to the affidavit the facts regarding Seivertson's vantage point at the time of his last observation. However, as previously noted, this is a matter of credibility and not independent evidence relevant to probable cause. The important fact here is what Seivertson believed he saw. We already know what Seivertson believed he saw -- i.e., the CI was half-way to the door of the 3340 residence -- was inaccurate. Defendants concede the CI purchased the narcotics at

the 3362 residence. Nevertheless, the trial court found Seivertson was merely negligent, not reckless, in believing he in fact saw what he did not in fact see, and we find this factual determination is supported by the record. Thus, it was unnecessary to amend the affidavit to substitute that Seivertson actually saw the CI half-way to the 3362 residence.[13/]

V

The original affidavit did not

---

13. Plaintiffs also contend the affidavit should have recited Seivertson thought he saw the CI go through a chain link fence to get into the yard. However, as previously discussed, Seivertson's trial testimony was that there was no chain link fence at the 3340 residence. (RT 99) Although he testified at deposition he thought he saw a chain link fence on the property, this can be explained because, as Seivertson acknowledged, there were several chain link fences between the CI and Seivertson's point of observation. (RT 94-95) There was also a fence running down both sides of the 3340 residence.

mention the CI's contact with the black male after the buy. Because of their concern for the safety of the CI, the officers intentionally omitted this information.[14/] Their decision was approved by the deputy district attorney who reviewed the affidavit before it was presented to the magistrate.

The trial court concluded the officers' deliberate omission of this information in order to protect the CI's safety "is not a sufficient reason to jeopardize a citizen's 4th Amendment rights." However, the court also concluded the information, when viewed as a whole, had nothing to do with the drug purchase and therefore "was not material to the determination of probable cause and

---

14. The CI testified that had this information been included he would have been identified "in a second." (RT 764)

although deliberately omitted did not affect the 'truthfulness' of the affidavit in the Franks' [sic] sense."

Because the trial court concluded the information was not relevant to probable cause, it could have been left out of the revised affidavit altogether. Nevertheless, the court revised the affidavit to add the following: "Sergeant Seivertson told me that upon seeing the CI by his vehicle he also observed a male black adult in the passenger seat of the CI's vehicle and a verbal confrontation took place between the CI and the male black adult and he then observed the male black adult to get out [sic] of the vehicle and the CI then left the area. . . . [The CI] further told me that he did not get any dope from the male black adult who was in his truck and that he did not have any physical contact with this male black

adult. . . . The CI told me that the CI . . . after having the confrontation with the male black adult who was then seated in his vehicle and after getting this male black adult to leave his vehicle, left the area."

Plaintiffs contend the court erred in considering anything other than that there had been an unplanned contact after the buy which destroyed the usefulness of the buy for purposes of supporting probable cause. They argue information regarding the nature of the contact had not been withheld deliberately and hence should not be considered in a Franks hearing.

We have already rejected plaintiffs' argument a Franks revision must be restricted to information deliberately or recklessly withheld which tends to negate probable cause. The purpose of a Franks hearing is "not punitive but remedial"

(People v. Costello, supra, 204 Cal.App.3d 443) i.e.,to rewrite the affidavit to include all material information known to the officers at the time the original affidavit was prepared. The idea is to present a complete picture of the situation as it appeared to the officers at the time. It was therefore appropriate for the court to consider what the officers knew about the contact with the black male.

Plaintiffs contend it was also appropriate for the court to consider that the CI gave a portion of the narcotics to the black male. This fact, they argue, negates the suggestion there had been no contact or transaction between the CI and the black male and negates the inference the purchase had been controlled.

Because the revised affidavit did not include the information that the CI gave

narcotics to the black male, we assume the trial court found this fact was not known by the officers at the time the affidavit was presented to the magistrate. Although the Franks hearing is designed to present a complete picture of the situation at the time the affidavit was prepared, it is the picture as it appeared to the officers which is critical. If the law were otherwise, few erroneous searches could withstand constitutional challenge. For example, in this instance it is now known the purchase of narcotics occurred at the 3362 residence. If this fact were included in the affidavit, there would obviously be no probable cause to search the 3340 residence.

The record supports the trial court's implicit finding the officers were not aware of the exchange of narcotics between the CI and the black male. Seivertson

testified he saw the CI standing beside his vehicle with the black male inside. The two were having an "agitated discussion," with the CI "yelling at the guy." According to Seivertson, there was no physical contact 20
between the CI and the black male and no indication of an exchange. The CI and the black male were never in the vehicle together.

Farnsworth testified he saw the black male on the passenger side of the vehicle either trying to get in or trying to get out. Later, he observed the CI getting into his vehicle while the black male was outside on the passenger side. Stanfield testified his first sighting of the CI after the buy was as the CI was getting into his vehicle. The black male was outside the vehicle. Stanfield further testified that at the post-buy meeting the

CI informed him the black male wanted a ride but the CI "didn't want anything to do with this guy because the CI knows the controls that are in place, he knows he can't have contact with anybody . . . ."

Plaintiffs argue Seivertson was aware the CI had been required to give a portion of the narcotics to the black male. However, the only testimony supporting this argument is that of the CI.[15/] According to the CI, he told the officers at the post-buy meeting he gave the black male a "piece" of the narcotics because it was the only way to get rid of him and the officers responded, "well, we're not supposed to say that."

Seivertson testified at trial the CI

---

15. Plaintiffs also cite trial testimony of Farnsworth. However, none of the testimony cited by plaintiffs has any bearing on this issue.

did not say anything at the post-buy meeting to suggest there had been an exchange or transaction between the black male and the CI. Stanfield also testified the CI told the officers nothing about giving a portion of the narcotics to the black male.

Regardless of whether the court accepted certain portions of the CI's testimony, it was certainly justified in crediting the testimony of the officers over that of the CI on this point. We do not substitute our judgment on questions of credibility unless the testimony "'is so inherently improbable and impossible of belief as in effect to constitute no evidence at all.'" (Peirson v. Superior Court, supra, 8 Cal.App.3d at pp. 518-519.) We do not find the explanation of the officers so inherently improbable as to constitute no evidence and hence

deem their testimony sufficient to support the trial court's findings.

VI

Plaintiffs' final disagreement with the revised affidavit relates to the officers' "apprehension" regarding their identification of the residence where the purchase occurred. At trial, Seivertson responded affirmatively to plaintiffs" counsel's question: "And isn't it true that you were apprehensive about this transaction because you lost sight of this informant and you did not see the informant go directly to the door?" Stanfield also testified that he had some apprehension regarding whether they had the right house. However, these are not facts relevant to probable cause but simply matters bearing on the strength to be accorded the testimony of these witnesses regarding their identification

of the premises. This information was available to the trial court and presumably was considered when the court made its various fact determinations.

VII

We conclude each of the trial court's revisions of the search warrant affidavit is supported by substantial evidence. Moreover, the court did not err in rejecting any of the plaintiffs' proposed revisions. Apparently recognizing the futility of such a claim under the totality of the circumstances standard of Illinois v. Gates (1983) 462 U.S. 213, 232 [76 L.Ed.2d 527, 544], plaintiffs do not challenge the adequacy of the affidavit as revised to support probable cause. Indeed, the revised affidavit sets forth probable cause for the search warrant and for that reason, we need not address plaintiffs' challenge to the trial court's finding

Stanfield relied on a defective warrant in good faith.

The judgment is affirmed.

Puglia, P.J.

We concur:

Sparks, J.

Sims, J.

Dated: April 1, 1994

APPENDIX F

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

TERRI TILLMAN-BROWN, ET AL.

Plaintiff and Appellant

vs. 3 Civil C015317

C I T Y O F SACRAMENTO, ET AL. Sacto. CV513950

Defendant and Respondent

By the Court:

Appellants' petition for rehearing is denied.

Dated: April 26, 1994

PUGLIA, P.J.

- - - - - - - - - - - - - - -

cc: See Mailing List

APPENDIX G

Third Appellate District No. C015317

S039722

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

TERRI TILLMAN-BROWN Et Al., Appellants

v.

CITY OF SACRAMENTO Et Al., Respondents

Appellants' petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

Dated: June 22, 1994

Lucas

Chief Justice

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: 11246 Gold Express Drive, Suite 100, Gold River, California 95670.

On September 19, 1994, I served the foregoing document(s) in the case Tillman-Brown, et al. v. City of Sacramento, et al. described as:

PETITION FOR WRIT OF CERTIORARI

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

UNITED STATES SUPREME COURT
1-1st Street
NE Washington DC 20543

XX (BY FEDERAL EXPRESS) I caused such document(s) to be delivered by

SACRAMENTO SUPERIOR COURT
Attn: Judge Backus
720 Ninth Street
Sacramento, CA 95814

CALIFORNIA SUPREME COURT
303-2nd Street, Room 8023
San Francisco, CA 94107-1317

CALIFORNIA COURT OF APPEAL
Third Appellate District
914 Capitol Mall, #100
Sacramento, CA 95814-4869

Bruce Kilday, Esq.
BOLING, WALTER & GAWTHROP
P.O. Box 255200
Sacramento, CA 95865-5200

XX (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail in Sacramento County, California.

Executed on September 19, 1994, in Gold River, Sacramento County, California.

Holly Mills

HOLLY MILLS

OPPOSITION

BRIEF

No. 94-506

Supreme Court, U.S.
FILED
OCT 14 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

TERRI TILLMAN-BROWN and DONOVAN BROWN,

Petitioners,

v.

CITY OF SACRAMENTO, DETECTIVE STANFIELD and DOES 1-200, inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

KATHY CHRISTOPHER BREINING
BRUCE A. KILDAY*
BOLLING, WALTER & GAWTHROP
8880 Cal Center Drive, Suite 400
Post Office Box 255200
Sacramento, California 95826-5200
(916) 369-0777
Attorneys for Respondents City of Sacramento and Detective Stanfield

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

20 pp

QUESTIONS PRESENTED

Whether the lower courts correctly determined that the search warrant affidavit, as modified pursuant to the principles set forth in *Franks v. Delaware*, 438 U.S. 154, 89 S.Ct. 2674, 56 L.Ed.2d 667 (1978), established probable cause to search Petitioners' residence at 3340 Santa Cruz Way; and, if not, whether Respondent DALE STANFIELD is immune from liability in any event.

PARTIES

Petitioners TERRI TILLMAN-BROWN and DONOVAN BROWN are individuals and were the Plaintiffs-Appellants below. Respondent CITY OF SACRAMENTO is a public entity and Respondent DETECTIVE DALE STANFIELD is an individual and they were Defendants-Appellees below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES ..... iv, v

STATEMENT OF THE CASE 1

OPINIONS AND JUDGMENTS DELIVERED BELOW 2

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT 3

I. THE DECISION BELOW IS CORRECT 4

II. THE LOWER COURTS DID NOT IGNORE ANY CONTROLLING AUTHORITY OF THIS COURT 6

III. RESPONDENTS' HONEST MISTAKE WAS NOT RACIALLY MOTIVATED NOR BASED ON THE OPPRESSION OF THE ECONOMICALLY DISADVANTAGED 10

IV. OTHER PERCEIVED MISSTATEMENTS OF FACT 11

V. QUALIFIED IMMUNITY IS NOT REVIEWABLE IN THIS CASE BY PETITION FOR CERTIORARI 12

VI. DETECTIVE STANFIELD IS IMMUNE FROM LIABILITY 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Ins. v. Ward, 140 U.S. 76 (1891) 8

Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) 8

Forster v. County of Santa Barbara, 896 F.2d 1146 (9th Cir. 1990) 13

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 56 L.Ed.2d 667 (1978) 1, 3, 4, 5

Hansen v. Bear Film Co., 28 Cal. 2d 154, 168 P.2d 946 (1946) 8

Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) 6

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 3

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) 3

Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988) 12

People v. Costello, 204 Cal.App.3d 431, 251 Cal.Rptr. 325 (1988), *cert. denied*, 492 U.S. 921, 109 S.Ct. 3249, 106 L.Ed.2d 595 (1989) 6

People v. Kurland, 28 Cal.3d 376, 168 Cal.Rptr. 667, 618 P.2d 213 (1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2321, 68 L.Ed.2d 844 (1981) 6

People v. Luevano, 167 Cal.App.3d 1123, 213 Cal.Rptr. 764 (1985) 6

St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) 6

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Condo, 782 F.2d 1502 (9th Cir. 1986) 5

United States v. DeLeon, 979 F.2d 761 (9th Cir. 1992) 5

United States v. Ippolito, 774 F.2d 1482 (9th Cir. 1985) 5

United States v. Stanert, 762 F.2d 775 (9th Cir. 1985), *amended, reh'g denied*, 769 F.2d 1410 (9th Cir. 1985) 4, 5, 6

United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979) 6

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) 12

STATUTES AND OTHER AUTHORITIES

42 U.S.C. § 1983 ..... 1, 2

United States Supreme Court Rule 14.5 7

United States Supreme Court Rule 15.1 11

California Code of Civil Procedure § 582 2

STATEMENT OF THE CASE

This is an action for damages based on the alleged violation of Petitioners' civil rights (42 U.S.C. § 1983). Petitioners, who are residents of the home located at 3340 Santa Cruz Way which was searched pursuant to a search warrant, seek review of the California Court of Appeal's unpublished decision affirming the trial court's dismissal of Petitioners' action following a hearing pursuant to *Franks v. Delaware, supra,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667. The underlying action arose out of an undercover narcotics operation whereby CITY OF SACRAMENTO police officers including DETECTIVE DALE STANFIELD, Sergeant Donald Farnsworth and Sergeant Al Seivertson worked with a confidential informant (hereinafter "CI") to identify the home from which crack cocaine was being sold. A controlled purchase was scheduled to take place, and the officers observed the activity from their various vantage points. The crack house was identified as the first house south of a vacant lot on Santa Cruz Way. DETECTIVE DALE STANFIELD prepared an affidavit containing information obtained through the CI and the officers' observations. The affidavit was presented to a magistrate who issued a search warrant which was served and executed on Petitioners' home. It was ultimately determined that the home from which narcotics were purchased by the CI was actually the home next door to Petitioners' residence (3362 Santa Cruz Way).

The trial court held a hearing pursuant to *Franks v. Delaware, supra,* wherein the trial court struck from the original affidavit those material misstatements which it found to be included in reckless disregard for the truth, and added those material facts which it found to have

been omitted in reckless disregard for the truth. The trial court determined that the search warrant affidavit, as modified, established probable cause to search Petitioners' residence at 3340 Santa Cruz Way. The trial court further determined that, even if it did not, Respondent DALE STANFIELD is qualifiedly immune from liability in any event. Petitioners' 42 U.S.C. § 1983 action was dismissed. Petitioners appealed the judgment and the California Court of Appeal affirmed in full the Superior Court's judgment in favor of Respondents. The California Supreme Court denied Petitioners' Petition For Review of the Court of Appeal's decision, with only Justice Mosk being of the opinion that the matter should be heard.

OPINIONS AND JUDGMENTS DELIVERED BELOW

Judgment of dismissal on the merits of Petitioners' 42 U.S.C. section 1983 action pursuant to California Code of Civil Procedure section 582 was entered on January 12, 1993 after a Determination of Probable Cause made on December 23, 1992 by the Honorable A. Richard Backus, Judge of the Superior Court of the County of Sacramento, State of California. (See Petitioners' Appendices D and C, respectively.)

Petitioners appealed the judgment to the Court of Appeal of the State of California, Third Appellate District. The judgment of the trial court was affirmed by opinion filed April 1, 1994.[1]

[1] The text of the Appellate Court's opinion is incorrectly set forth in Petitioners' Appendix E. Footnotes actually designated

The Court of Appeal of the State of California in and for the Third Appellate District denied Petition For Rehearing on April 26, 1994. (See Petitioners' Appendix F.) The Petition For Review by the Supreme Court of the State of California was denied on June 22, 1994. (See Petitioners' Appendix G.)

SUMMARY OF ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. The decision below is correct. The courts below simply followed this Court's decisions in *Franks v. Delaware, supra, Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), and other similar cases decided by Federal and California courts. Review is not needed either to secure uniformity of decision or to settle important questions of law not previously addressed by this Court. The Petition For Writ Of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

The decision of the California Court of Appeal is in complete harmony with this Court's decision in *Franks v. Delaware, supra,* and its progeny. This case presents no special or important reasons for granting the Petition.

---

1 through 12 in the Appellate Court opinion are misdesignated footnotes 4 through 15 in Petitioners' Appendix E.

Respondents' honest mistake in searching the wrong house was not racially motivated nor based on a desire to oppress the economically disadvantaged. The Petition is based upon a mischaracterization of the facts, which is itself a reason for denying the Petition.

I.

THE DECISION BELOW IS CORRECT

In *Franks v. Delaware, supra,* this Court held that a search warrant, valid on its face, may be voided if the affidavit supporting the warrant contains statements that are knowingly and intentionally false or made with a reckless disregard for the truth, and if the false statement is necessary to the finding of probable cause. (*Id.* at 155-156, 98 S.Ct. at 276-277.) In *United States v. Stanert,* 762 F.2d 775 (9th Cir. 1985), *amended, reh'g denied,* 769 F.2d 1410 (9th Cir. 1985), the rationale of *Franks* was extended to deliberate or reckless omissions. At the conclusion of a *Franks* hearing, the trial court, as affirmed by the Appellate Court, struck from the original affidavit those material misstatements which it found to be included in reckless disregard for the truth, and added those material facts which it found to have been omitted in reckless disregard for the truth.[2] (See Petitioners' Appendix B.) It

---

[2] The affidavit was modified to reflect that the CI identified the subject house as the first house south of the vacant lot on Santa Cruz Way rather than by street number, that Seivertson told Stanfield he saw the CI walking to the yard area rather than directly to 3340 Santa Cruz Way, that Seivertson told Stanfield he lost sight of the CI when he was about half way between the sidewalk and the front door or porch area rather than as he

then tested the adequacy of the modified affidavit to support probable cause. (See Petitioners' Appendix C.) The lower courts thus applied the correct legal principles. (See *Franks v. Delaware, supra,* 438 U.S. 154; *United States v. Stanert, supra,* 762 F.2d 775.)

Petitioners complain here, as they did before the Appellate Court, that the trial court erred when it included in the modified affidavit facts which, though known to at least one of the officers, were not directly told to STANFIELD who was the affiant. As the Appellate Court pointed out, this is a "red herring". (See Petitioners' Appendix E, p. 28.) As Petitioners themselves have argued, controlling law establishes that the affidavit must include facts reasonably known to any government agent involved in the transaction, not just the affiant. (*Franks v. Delaware, supra,* 438 U.S. at p. 165, fn. 6, 15 L.Ed.2d at p. 667; *United States v. DeLeon,* 979 F.2d 761, 763-764 (9th Cir. 1992).)

"Federal and state courts recognize that two types of correction are envisioned in *Franks*: (1) material misstatements are stricken; and (2) material omissions are added. The aim in either case is not punitive but remedial – to make the affidavit *read as it should have* so that the reviewing court can then retest for probable cause support. (*United States v. Ippolito* (9th Cir. 1985) 774 F.2d 1482, 1486-1487, n.1 and cases cited; *United States v. Condo* (9th

---

approached the front door, that Seivertson told Stanfield the CI was next seen in a verbal confrontation in his truck with a black male rather than simply entering his vehicle and leaving the area, and that the CI told Stanfield he did not get any dope from the black male and did not have any physical contact with him.

Cir. 1986) 782 F.2d 1502, 1506; *United States v. Stanert* (9th Cir. 1985) 762 F.2d 775, 780-781, *mod. and reh'g. denied*, 769 F.2d 1410; *People v. Kurland* (1980) 28 Cal.3d 376, 383-398, *cert. denied* (1981) 451 U.S. 1987 [168 Cal.Rptr. 667, 618 P.2d 213]; *People v. Luevano* (1985) 167 Cal.App.3d 1123, 1127-1128 and f.n. 3 [213 Cal.Rptr. 764].)" (*People v. Costello*, 204 Cal.App.3d 431, 443, 251 Cal.Rptr. 325 (1988), *cert. denied*, 492 U.S. 921, 109 S.Ct. 3249, 106 L.Ed.2d 595 (1989); emphasis added.)

The trial court did not modify the affidavit to include inculpatory matters which were not known to the government agents involved in the transaction. All of the omitted facts which were inserted by the court to "complete the picture" were known to the affiant or to one of the other officers involved in the transaction, so that the modified affidavit reflects their collective knowledge at the time when they applied for the search warrant.

II.

THE LOWER COURTS DID NOT IGNORE ANY CONTROLLING AUTHORITY OF THIS COURT

Petitioners contend that the California Supreme Court ignored this Court's holding in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), cited with approval in *Herbert v. Lando*, 441 U.S. 153, 156, 99 S.Ct. 1635, 1639, 60 L.Ed.2d 115 (1979). Said cases are First Amendment cases dealing with the subject matter of libel and are not controlling.

To the extent that said cases define the meaning of the term "reckless disregard for the truth" in the Fourth Amendment sense (see *United States v. Davis*, 617 F.2d

677, 694 (D.C. Cir. 1979), cited by Petitioners) they were not ignored by the courts below. This court in *St. Amant v. Thompson* equated "reckless disregard for the truth" with entertaining, in fact, serious doubts as to the truth. (*Ibid.*) The lower courts did not refuse to apply this precedent; instead, there was simply no evidence whatsoever that any of the police officers involved in the transaction entertained serious doubts as to the truth of the allegations set forth in their search warrant affidavit.

The main thrust of Petitioners' request for review is their assertion that "each and every one" of the police officers involved admitted that they entertained serious doubts as to the truth of the allegations set forth in the search warrant affidavit. (Pet. at p. 25, emphasis original.) Petitioners state that the Appellate Court considered these "admitted serious doubts as to the truth of the allegations" but thought them irrelevant to probable cause, which Petitioners assert is error. (Pet. at p. 29.) As they are wont to do,[3] Petitioners' misquote the Appellate Court opinion and mischaracterize the facts. This alone is sufficient ground upon which to deny the petition.[4]

---

[3] The Appellate Court found the practice sufficiently disturbing to warrant this comment: "In flagrant disregard of basic rules of appellate practice, plaintiffs in their briefs present a statement of facts so one-sided and misleading as to be totally useless for our purposes. . . . Furthermore, as will be detailed later, in several instances plaintiffs have recited 'facts' either not supported by the record as cited or directly contradicted by other evidence." (Appellate Court Opinion, footnote 3 in original, erroneously designated footnote 6 of Petitioners' Appendix E.)

[4] United States Supreme Court Rule 14.5 provides: "The failure of a petitioner to present with accuracy, brevity, and

None of the police officers admitted entertaining serious doubts as to the *truth* of the allegations contained in their search warrant affidavit. To the contrary, Officer Seivertson testified that he had a "clear view" of the CI as he approached the house from which he purchased narcotics. Petitioners argue that Officer Seivertson could not have had a clear view, but credibility determinations are to be made by the trier of fact. (*Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Aetna Life Ins. v. Ward*, 140 U.S. 76, 88 (1891); *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 158, 168 P.2d 946 (1946).) In any event, Officer Seivertson did not ever admit that he had any doubt as to the truth of what he related to Officer STANFIELD regarding what he had observed.

Officers STANFIELD and Seivertson were positive that the CI identified the crack house as the first house south of the vacant lot on Santa Cruz Way. Officer Farnsworth heard this same description both at a meeting before the controlled buy and one held afterward, although he could not specifically recall who gave the description. None of them had any doubts about whether the house was described as the first house south of the vacant lot on Santa Cruz Way. Petitioners' home at 3304 Santa Cruz Way was the first house south of a vacant lot and was the only house on that street located next to a vacant lot. In their search warrant affidavit, the officers

---

clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

used the street address for the house, rather than describing it as "the first house south of the vacant lot on Santa Cruz Way". They did not entertain serious doubts as to the truth of the allegation that drugs were purchased from that location when they applied for the search warrant.

The Appellate Court absolutely did not find that the police officers involved had admitted serious *doubts* as to the *truth* of the allegations set forth in the search warrant affidavit. Petitioners paraphrase the Appellate Court's opinion (in brackets on page 29 of the petition) and in doing so, misquote the Appellate Court. A review of the Appellate Court opinion discloses that what the Appellate Court actually referred to was the *apprehension* felt by Seivertson and STANFIELD as a result of having lost sight of the CI before he reached the front door, which the Appellate Court determined was not relevant to probable cause but instead bears on the strength to be accorded the testimony of the officers regarding their identification of the premises. (Appellate Court Opinion, Petitioners' Appendix E, pp. 42-43.) Furthermore, the apprehension attributed to Officer STANFIELD relates to feelings he had after the search warrant was already issued; and he testified that his apprehension was certainly not to the degree that he would consider a "doubt" as to whether they were about to execute the search warrant on the right house. Officer Farnsworth never even testified to having been apprehensive.

III

RESPONDENTS' HONEST MISTAKE WAS NOT RACIALLY MOTIVATED NOR BASED ON THE OPPRESSION OF THE ECONOMICALLY DISADVANTAGED

Petitioners assert that this case is appropriate for review by this court because " 'the war on drugs' should not be used as an excuse to trample the rights of minority members of society living in economically deprived neighborhoods." (Pet. at p. 16.)

The dismissal of Petitioners' case came after a lengthy evidentiary hearing during which there was not a shred of evidence produced which would even tend to suggest that the police officers' conduct was racially motivated. Nor is there a scintilla of evidence in the record which would support Petitioners' contention here that the police officers obtained a search warrant for drugs as a ruse to trample the rights of the citizens of an economically deprived neighborhood. The record is devoid of any evidence on this score both as relates to the allegedly improper animus of the officers and as relates to the supposedly "economically deprived" status of Petitioners.

Petitioners paint a picture very different from the evidence which actually establishes an honest mistake made by earnest police officers who were told by their previously reliable informant that crack cocaine was being sold from the first house south of the vacant lot on Santa Cruz Way. As it turns out, the drugs were purchased by the CI from another address on Santa Cruz Way; but certainly one cannot legitimately argue that the

whole operation was a sham and excuse to deprive the neighborhood residents of their constitutionally protected rights.

IV.

OTHER PERCEIVED MISSTATEMENTS OF FACT

In compliance with United States Supreme Court Rule 15.1,[5] Respondents point out these additionally perceived misstatements of the facts material to the proper disposition of the petition.

Petitioners refer to the CI as an "untested" informant. (Pet. at p. 41.) The evidence establishes that the CI was known to the police officers as a reliable and previously tested informant.

Petitioners assert (Pet. at p. 9) that the police officers were advised by the CI that he had "chipped off" to a black male adult he found in his truck some of the cocaine he had purchased, and that the officers intentionally never disclosed this purported fact to the magistrate. In actuality, the record supports the trial court's

---

[5] Rule 15.1 provides in relevant part as follows: "A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. . . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition and not later. . . ."

implicit finding that the officers were not aware of the exchange of narcotics between the CI and the black male if it occurred. In addition, Petitioners fail to advise this court that the officers left out of the affidavit the fact of the CI's verbal altercation with the black male because of their concern for the CI's safety[6] and not as an attempt to mislead the magistrate. Before presenting their affidavit to the magistrate, the officers sought and obtained from a Deputy District Attorney approval of their decision to leave out of their affidavit the reference to the black male adult.

V.

QUALIFIED IMMUNITY IS NOT REVIEWABLE IN THIS CASE BY PETITION FOR CERTIORARI

The Appellate Court agreed with the trial court that the revised affidavit sets forth probable cause for the search warrant; and for that reason, the Appellate Court declined to review the trial court's indication that STANFIELD would be qualifiedly immune from suit in any event. (See Petitioners' Appendix E, pp. 2, 43-44.) "This Court usually will decline to consider questions presented in the petition for certiorari that have not been considered by the lower court." (*Patrick v. Burget*, 486 U.S. 94, 99, 108 S.Ct. 1658, 1662, 100 L.Ed.2d 83 (1988); citing *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).)

---

[6] It was the testimony of the CI that he would have been identified "in a second" had the fact of this verbal altercation been included in the search warrant affidavit.

VI.

DETECTIVE STANFIELD IS IMMUNE FROM LIABILITY

Were this Court to consider the question of STANFIELD's qualified immunity, it would determine that the trial court was correct in its assessment that STANFIELD is immune. The law as it applies to "good faith immunity" is as follows:

> "A police officer is qualifiedly immune from a suit for damages arising from an allegedly illegal arrest or search unless 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.' *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986)." (*Forster v. County of Santa Barbara*, 896 F.2d 1146 (9th Cir. 1990).)

Officer STANFIELD knew when he applied for the warrant that the CI was a reliable informant. The trial court found, after considering all of the evidence, that STANFIELD had no reason to believe to be false those facts which were supplied to him by other officers in reckless disregard for the truth. There is no evidence which would support a contrary finding. STANFIELD sought the counsel of a supervising Deputy District Attorney in a good faith attempt to determine if the omission of the reference to the black male adult would affect probable cause, and he was informed that it would not. The record is devoid of any evidence which would establish that STANFIELD should have known his affidavit failed to establish probable cause and that he

should not have applied for the warrant. As such, the officer is qualifiedly immune.

CONCLUSION

Review of the California Court of Appeal's unpublished decision is not appropriate. The Court of Appeal determined that the trial court's modification of the search warrant affidavit was supported by law and substantial evidence. The Court of Appeal opinion is in complete conformity with United States and California decisions. Additionally, Petitioners raise no issues which this Court has not already conclusively resolved. There is no evidence which would support Petitioner's contention that the search warrant was obtained as a ruse to trample the Constitutional rights of minority and economically disadvantaged individuals. There are no special or important reasons which would justify the granting of the Petition, and Respondents respectfully assert that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

Dated: October 7, 1994

KATHY CHRISTOPHER BREINING
BRUCE A. KILDAY*
BOLLING, WALTER & GAWTHROP
8880 Cal Center Drive,
Suite 400
Post Office Box 255200
Sacramento, California 95826-5200
Attorneys for Respondents
City of Sacramento and
Detective Stanfield

*Counsel of Record